



**BURGESS
SALMON**

Environment and energy from Burgess Salmon published in the
December 2009/January 2010 issue of The In-House Lawyer:

Tidying up: revisions to waste permitting exemptions

THE 
IN-HOUSE
LAWYER

Tidying up: revisions to waste permitting exemptions

SINCE 2007, DEFRA, THE ENVIRONMENT Agency (EA) and the Welsh Assembly Government have been reviewing the waste exemptions from environmental permitting, a system that has been in place and largely unchanged for 15 years. In broad terms, certain waste activities, such as burning waste as fuel or spreading sludge on agricultural land, were exempt from the need to obtain a waste management licence or, since 2007, an environmental permit. These exempt activities still needed to be registered with the EA, but were intended to reduce the burden on businesses carrying out low-risk waste activities while still affording the regulators the ability to retain a sufficient degree of control.

TIME FOR CHANGE

What had become increasingly clear to operators and advisers in the waste sector was that the exemption regime needed to be made simpler and clearer, a belief that was echoed under the government's Better Regulation Agenda. Certain exemptions had become more and more complicated, and in some cases, anomalies had arisen between similar operators as to who did and who did not require an environmental permit. For example, certain low-risk activities had been identified for which no exemptions were available, but were not thought to have sufficient impact to require a full permit. Rather than impose a substantial cost and management burden on these businesses by requiring them to apply for an environmental permit, the EA had to adopt a 'low-risk position', a temporary discretion that allowed operators of those activities to continue, despite not having either an exemption or a permit. It was estimated that approximately 143,000 sites were reliant on one or more exemptions and it is telling that Defra's view was that a 'large number' were reliant on low-risk positions. Something, therefore, needed to be done.

It was also necessary to develop new exemptions to allow for technical

advancement, and new techniques for the disposal and recovery of waste. One recent example is the development of anaerobic digesters. As a final spur (as if one were needed), clarification of the definition of waste was needed as a result of European case law. For all of these reasons, substantial change was inevitable, not only to clarify the regulatory framework, but also with the aim of minimising the burden on businesses operating in this sector. The reader can judge for themselves as to whether this aim has been met!

What is clear is that businesses in the waste sector that currently operate exempt waste activities, or have managed activities under the EA's low-risk position, will need to be highly vigilant between now and 6 April 2010, when the new regime comes into force. At the very least, they will need to re-register their exemptions. Most importantly, certain activities that have historically been exempt will no longer be and, if this is the case, businesses will need to apply for an environmental permit. This permit may be one of the EA's new standard permits or a bespoke waste permit. Defra estimates that this will affect 5% of operators, which, bearing in mind the estimated number of exempt or low-risk sites, means that over 7,000 new environmental permits are likely to be required.

The other key message is that certain exemptions that are registered before 5 April 2010 will continue to be valid in the short term while the regime is phased in. For this reason, new operators should ensure that they have all their exemptions registered prior to this date.

WHAT HAS THE GOVERNMENT BEEN DOING?

Following an informal discussion paper in 2007, Defra has released two primary consultations: 'Revised Waste Exemptions from Environmental Permitting' and 'Draft



'Businesses in the waste sector that currently operate exempt waste activities will need to be highly vigilant between now and 6 April 2010.'

Chris Pritchett, senior associate, Burges Salmon LLP
E-mail: chris.pritchett@burges-salmon.com

'There is also the potential for the waste exemptions to be reviewed every three years, so operators will need to monitor these proposed changes and prepare for certain exemptions being removed.'

Environmental Permitting Guidance – Waste Exemptions'. The latter of these is open until January 2010 and businesses that could potentially be affected by the proposed changes should consider responding to this paper. The enabling regulations, the Environmental Permitting (England and Wales) (Amendment) Regulations (EPR) 2009, will bring the regime into life in April 2010.

MAIN CHANGES

- 1) The current exemptions will be replaced with updated exemptions under the topic headings of:
 - a) use;
 - b) treatment;
 - c) disposal; and
 - d) storage at the place of production.
- 2) Some higher risk activities will now be regulated through standard permits rather than via complex exemptions.
- 3) Simple exemptions will no longer be registered for life and operators will need to re-register these exemptions with the EA every three years. There is also the potential for the waste exemptions to be reviewed every three years, so operators will need to monitor these proposed changes and prepare for certain exemptions being removed.
- 4) The majority of EA low-risk positions will benefit from one of the proposed updated exemptions.
- 5) Removing exemptions for Part B processes.
- 6) Not requiring registration for exemptions that fall outside of the Waste Framework Directive (the

Directive) (predominantly temporary storage of waste on the site at which it was produced). This is likely to affect 12% of currently registered exemptions.

CHANGES TO EXEMPTIONS

The new regime intends to make exemptions easier to find by structuring the exemption schedule according to the type of exempt activity. It also intends to use European Waste Catalogue codes to make it clear as to what type of material is intended to be the subject of the exemptions.

It is not possible to exhaustively list every change or proposed new exemption in this article and readers are referred to the consultation paper for a complete table of intended revisions. Some of the more noteworthy changes are set out in the table below. New exemptions include:

- use of small-scale on-farm anaerobic digesters;
- retreading of tyres; and
- use of waste tyre bales in engineered construction works.

NON-WASTE FRAMEWORK DIRECTIVE EXEMPTIONS

As already mentioned, certain activities are exempt from the Directive, but have historically required an exemption as a result of s33 of the Environmental Protection Act 1990, which made it an offence to 'deposit' controlled waste. The revised exemption schedule proposes that exemptions for temporary storage of waste should not require registration or renewal with the EA and, as an added benefit, there will not be any quantity limit imposed on the amount of material that can be temporarily stored.

The key new exemption is in Part 2 of the new schedule 3A to EPR 2009, and states that:

'Temporary storage at the place of production 1

- 1) The temporary storage of any waste at the place of production, pending its collection.
- 2) For the purposes of this paragraph, the conditions are:
 - a) no waste is stored for longer than 12 months; and
 - b) the waste is stored in a secure place.'

The important addition to this wording is the inclusion of the phrase 'pending its collection'. It will be interesting to see whether this will serve to limit the application of this exemption. The draft

CHANGES TO EXISTING EXEMPTIONS		
Exemption	Current limit	New limit
Waste for the benefit of land	1,500 tonnes per hectare (sugar beet spoil); 5,000 tonnes per hectare (dredging spoil)	Only minor spreading (eg green waste compost) allowed under exemption
Storage and use of building waste	Unlimited	500 tonnes per site per three-year registration period
Construction and soil materials	Manufacture - 500 tonnes per day	500 tonnes per site per year
Burning as fuel	25 tonnes at any one time	Exemption removed

guidance states that recovery operations will not prevent this exemption taking effect, so long as they are 'ancillary to collection', but one can imagine a situation where waste is stored pending a decision being made as to its ultimate fate. In such cases, will the exemption be invalid if there is no genuine intention to 'collect'?

TIMING AND TRANSITIONAL PROVISIONS

As soon as the regulations come into force:

- most activities covered by EA low-risk positions will need to register an exemption for the first time;
- some existing registered exemptions that are non-Directive exemptions will no longer be subject to registration and these will be removed from the public register of exempt activities;
- a small number of activities that have been subject to EA low-risk positions will need to obtain environmental permits by 1 October 2010 (although there is a risk that some of the activities may not ultimately be granted permits on environmental grounds); and
- operators starting exempt waste operations at a new site, or for the first time after, will have to register in accordance with the new requirements.

On or before 1 October 2010 (year one):

- operators of some higher risk simple exemptions (current paragraph 12 on composting, paragraph 13 on construction and soil materials and paragraph 28 on spreading ash) will need to apply for an environmental permit or stop carrying out the activity;
- some permitted activities will fail to be regulated under a new exemption and the permits may in fact be surrendered (the permit or part of the permit covered by the exemption is revoked when the exemption is registered); and
- higher risk activities registered under a notifiable exemption (paragraph 9 on land reclamation or improvement and paragraph 19 on waste for construction) will no longer be exempt

and operators will need to apply for a permit.

On or before 1 October 2011 (year two):

- higher risk activities registered under a notifiable exemption (other than those prescribed for year one or three) will cease to be exempt and operators will need to apply for a permit by 1 October 2011; and

- simple registered exemptions (other than those in respect of agricultural waste at agricultural premises) that will remain exempt will need to re-register and pay the first three yearly registration fees by 1 October 2011.

On or before 1 October 2012: (year three)

- simple registered exemptions carried out on agricultural premises in respect of agricultural waste that will remain exempt will need to re-register and pay the first three yearly registration fees by 1 October 2012;
- operators of Part B processes that require registration under current exemptions (paragraph 2 on scrap metal furnaces, paragraph 3 on burning waste as a fuel, paragraph 24 on crushing, grinding or size reduction of bricks, tiles and concrete, and

paragraph 43 on glass manufacture and production) will need to have their permits varied to regulate waste storage ancillary to the process by 1 October 2012; and

- higher risk activities registered under a paragraph 45 (recovery of scrap metal) exemption will cease to be exempt and operators will need to apply for a permit by 1 October 2012.

This means that operators will have to act promptly when the law comes into effect on 6 April 2010 to ensure that they have registered an exemption for the first time, re-registered an existing exemption or have applied for an environmental permit before the relevant transitional date. If these have not been done, they run the risk of committing a criminal offence.

The draft guidance suggests that the requirement is to apply for an environmental permit by the relevant dates, rather than actually obtain one. We are seeking clarification from Defra as to whether this is the case, because clearly operators will not want to carry the risk of the EA taking longer than expected to determine a new permit application, particularly as there may be a substantial backlog of applications resulting from the new regime.

FURTHER DEVELOPMENT OF STANDARD PERMITS	
Exemption number	Description
6	Spreading of sewage sludge on non-agricultural land
7	Spreading of industrial waste
9	Reclamation or improvement of land
12	Composting
13	Manufacture of construction products and soil from waste
19	Storage and use of building waste
25	Deposit of dredgings
28	Spreading of ash from pig or poultry incineration
45	Recovery of scrap metal and the dismantling of depolluted waste motor vehicle

'The fact that an additional 7,000 environmental permits are likely to be required indicates the substantial impact these revisions will have on industry. This will also bring with it an additional strain on EA resources.'

DEMONSTRATING TECHNICAL COMPETENCE

Operators will be allowed a period of 12 months after the issue of their permit to demonstrate technical competence (either Chartered Institution of Wastes Management (CIWM) or Waste Management Industry Training & Advisory Board (WAMITAB), or Environmental Services Association (ESA) or Energy & Utility (EU) Skills). The government is in discussion with technical competence scheme providers regarding the extent to which the requirements for a given type of operation will apply to existing operations moving from exemptions to permits during the transitional stages. It is possible that different requirements will be applied for different types of operation. Businesses will therefore need to be aware of possible differences in requirements of technical competence, and whether existing staff members hold the necessary qualifications or will need to be retrained.

STANDARD PERMITS

Certain higher-risk activities that are currently covered by notifiable exemptions are to be replaced with standard environmental permits. The government has introduced several standard permits that are designed to save time and cost in terms of the application process and maintaining the permit. There are currently 35 different standard permits covering different types of operations, but Defra is

consulting on several further variants. The table on p27 shows the main areas where further development of standard permits will take place.

The benefits of a standard permit over a bespoke permit are that the time taken and costs incurred in preparing applications will be significantly lower, as will the application fee and ongoing subsistence charges. In addition, standard permits contain a standard set of pre-prepared rules, which, so long as they can be complied with, will be the only environmental conditions applying to the site.

With bespoke permits there is a risk that the EA may impose other site-specific conditions that may make it more costly or difficult to comply with a permit. If there is the potential for a standard permit to be used for operations, this is likely to be the simplest and most cost-effective solution.

APPEALS

The current proposals state that no statutory appeal process against the regulator's failure to grant an exemption will be introduced. The reasons for this are that the more complex or high-risk the activity in question, the more likely it will be regulated by an environmental permit. As such, it was considered that an appeal process is likely to be burdensome and unnecessary for simple exemptions.

While there are routes for complainants to raise issues (such as to local authority or Parliamentary ombudsmen), these avenues are quite restricted to such matters as maladministration. It is interesting that failure to register a simple waste exemption could require a judicial review to correct!

CONCLUSION

Although much of the clarification of the waste permitting exemption regime and the widening of lower risk exemptions is to be welcomed, the fact that an additional 7,000 environmental permits are likely to be required indicates the substantial impact these revisions will have on the industry. This will also bring with it an additional strain on EA resources, as they will need to administer a high number of additional standard and bespoke environmental permits.

Businesses that currently operate exempt activities need to be very careful in case these exemptions cease to have effect or have new limits imposed on them, or if they are lucky, have environmental permits that may no longer be needed. Furthermore, this vigilance must be maintained, as three-yearly reviews of exemptions and the need to re-register means that business planning must take account of regular changes in the waste exemption regime. This uncertainty alone seems to be an additional burden on business and, in combination with the increased regulation for previously higher-risk exemptions, Defra's claim to reduce the impact on business looks increasingly spurious.

*By Chris Pritchett, senior associate in the environmental law team,
Burges Salmon LLP.
E-mail: chris.pritchett@burges-salmon.com.*