

ENVIRONMENTAL BETTER REGULATION BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial memorandum has been prepared by the Department of the Environment in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The Bill is a key element of the Department's Regulatory Transformation Programme. The overall aim of the Programme is to provide a more streamlined and effective regulatory system for businesses and regulators.
4. Over many years environmental legislation has become unnecessarily complex and fragmented which in turn has resulted in increased burdens on businesses regulated under the legislation.
5. The policy underlying Parts 1 and 2 of this Bill has resulted from extensive stakeholder engagement between businesses, regulators and environmental groups. During such consultation many businesses criticised environmental regulations, and regulation itself, for being complex, inflexible, incoherent and time-consuming to understand. The lack of integration between environmental permits and the resource intensive nature of complying with multiple, un-coordinated inspections were identified as regulatory burdens, particularly by small/medium sized business cited as hindering them from doing business.
6. The policy intention aligns with the Executive's Programme for Government priority of growing a sustainable economy and investing in the future by having a simpler, harmonised and easier to understand regulatory framework. It also supports the Executive initiative "Building a Prosperous and United Community" which refers to the need to reduce regulatory burdens and red tape for businesses.
7. Parts 3, 4 and 5 of the Bill contain miscellaneous amendments unrelated to Parts 1 and 2:
 - to amend the Clean Air (Northern Ireland) Order 1981 to streamline the procedure for authorising fuels and for exempting fireplaces under the provisions of that Order;

- to amend the Environment (Northern Ireland) Order 2002 to remove the requirement on district councils to make a further assessment of air quality under Article 13 of that Order;
- to amend the Water and Sewerage Services (Northern Ireland) Order 2006 to transfer responsibility for the regulation of drinking water quality for public supplies from the Department for Regional Development to the Department of the Environment.

CONSULTATION

Parts 1 and 2 – General Environmental Regulation & Powers of Entry and Associated Powers

8. The policy underlying Parts 1 and 2 has been developed as a result of extensive consultation, initially by research carried out and published in the Department's 2011 White Paper on Better Regulation. The Department consulted widely on its "Proposals for an Environmental Better Regulation Bill" in May 2013. The proposals contained in the consultation focused specifically on providing enabling powers for an integrated environmental permitting regime and the rationalising of the powers of entry for environmental inspection. The consultation also noted that subsequent phases to deliver the policy will include supporting subordinate legislation and guidance.
9. In excess of 140 individuals and organisations were consulted on the proposals, including political parties, the Environment Committee, MLAs, district councils and community and voluntary organisations. In addition advertisements publicising the consultation exercise were placed in the local press and full details of the consultation exercise were also available on the Department of the Environment's website.

Part 3 – Amendments to the Clean Air (Northern Ireland) Order 1981

10. The Department has not consulted on the change as in practice the process will remain essentially the same, i.e. the testing of fuels and fireplaces will still be undertaken jointly across the UK and district councils will still have enforcement powers under the 1981 Order.

Part 4 – Amendments to the Environment (Northern Ireland) Order 2002

11. As part of the ongoing review of local air quality management within the UK, the Department has consulted with district councils about the need to undertake Further Assessments of air quality to supplement information it already has. District councils were supportive of the policy to remove the requirement.

Part 5 – Amendments to the Water and Sewerage Services (Northern Ireland) Order 2006

12. The Department has not consulted on the proposed changes as this is an administrative change and the processes will remain the same, i.e. regulation of the private water supplies and regulation of public water quality supplies will be continued to be

undertaken but full responsibility for this regulation will be fully transferred to DOE from DRD.

OPTIONS CONSIDERED

Parts 1 and 2 – General Environmental Regulation & Powers of Entry and Associated Powers

13. The 2013 consultation proposals generally received widespread support from the majority of respondents and a number of face to face discussions also took place with some of the respondents. The Department assessed the implications of not introducing the Bill against the implications of introducing one and determined that not to introduce a Bill would risk the continuation of unnecessary regulatory burdens on businesses and a lack of focus on the high risk operators most likely to cause environmental damage.
14. Details of specific comments raised and the Department's response to those comments are set out in a consultation summary document on the Department's website.

http://www.doeni.gov.uk/index/protect_the_environment/local_environmental_issues/better_regulation.htm

Part 3 – Amendments to the Clean Air (Northern Ireland) Order 1981

15. Under the proposed option a simplified and less burdensome process for approving fuels and fireplaces would be introduced rather than having to continue to make regulations if a “do nothing option” was followed. Under the proposed option newly tested fuels and fireplaces would be approved administratively which would result in approvals being granted soon after the fuel or fireplace has been tested and found to be suitable for use in a smoke control area. It would also mean that manufacturers and suppliers would no longer face delays waiting for approval to market and sell their product after it has been tested. Defra and the Scottish Government have made similar amendments to their legislation.

Part 4 – Amendments to the Environment (Northern Ireland) Order 2002

16. Under a “do nothing option” the requirement to undertake Further Assessments of air quality, to supplement existing information on areas designated as an Air Quality Management Area would still be required to be reported on. This is seen as an unnecessary burden and an impediment to speedy preparation and implementation of local air quality action plans by district councils. Defra and the Scottish Government are also taking forward this amendment following discussions with local authorities in England, Scotland and Wales. The proposed option would remove the need for district councils to undertake such Further Assessments and would bring Northern Ireland into line with best practice elsewhere.

Part 5 – Amendments to the Water and Sewerage Services (Northern Ireland) Order 2006

17. Under the proposed option responsibility for the regulation of water quality in public drinking water supplies will transfer from DRD to DOE negating the need, under a “do

nothing option”, to report to two Ministers. Under the proposed option the Drinking Water Inspectorate (DWI) will therefore carry out the regulatory functions for public drinking water quality supplies on behalf of DOE and will report only to the DOE Minister. This will allow a simplified and less burdensome process for the DWI.

OVERVIEW

18. The Bill has 27 clauses, 3 Schedules and is divided into 6 distinct Parts.

COMMENTARY ON CLAUSES

A commentary on the clauses is provided below. Comments are not given where the wording is self-explanatory.

PART 1 – GENERAL ENVIRONMENTAL REGULATION

Clause 1: General purpose: protecting and improving the environment

Clause 1 sets out the general purpose of Part 1, i.e. to make, by regulations, provision for protecting and improving the environment and specifies that the purpose extends to provision regulating environmental activities and provision implementing EU obligations or other international obligations.

Clause 2: Regulations relating to protecting and improving the environment

Clause 2 (subsection (1) enables the Department to make provision by regulations for any of the matters specified in Schedule 1.

Subsection (2) sets out that the provision that may be made is provision for and in connection with the matters mentioned in section 1.

Subsection (3) allows for regulations to provide that specified provisions of the regulations have effect in relation only to specified regulated activities, the carrying on of regulated activities in specified circumstances or the carrying on of regulated activities by specified persons or classes of person.

Subsection (4) allows for regulations to modify any statutory provision or document, make different provision for different cases, provide for the delegation of functions and impose requirements.

Subsection (5) allows regulations to contain consequential, incidental, supplementary, transitional or saving provisions as necessary.

Clause 3: Regulations relating to protecting and improving the environment: consultation

Clause 3(1) requires the Department, before making regulations relating to protecting and improving the environment, to consult certain regulators and such other persons as it thinks

fit. Subsection (2) has the effect that such consultation can be undertaken prior to the coming into operation of this section

Clause 4: General environmental rules

Clause 4 enables the Department, by regulations under section 2 pursuant to paragraph 5(3)(c) of Schedule 1, to provide for general environmental rules to impose conditions or requirements, prescribe standards or objectives to be complied with or achieved, and require standards or objectives specified in or under other statutory provisions to be complied with or achieved.

Subsections (2), (3) and (4) require the Department to publish a draft of the proposed rules and to publicise the opportunity to make representations and allow copies of the proposed rules to be available for public inspection. The Department will have regard to any representations made to it within the determined period.

Clause 5: Interpretation

Clause 5 defines terms used in Part 1 of the Bill. It includes definitions of “environmental activities” (to cover activities that are capable of causing, or liable to cause, environmental harm) and “environmental harm” (to cover a wide range of matters, including harm to the quality of the environment such as might be caused by, for example, polluting activities. In this context, “activities” is also defined, so that it covers a broad range of matters including the production, treatment, keeping, transportation, depositing or disposal of substances. The effect is that the Bill enables the regulation under section 2 of a wide range of matters relating to environmental activities, and the prevention of environmental harm. Regulations under section 2 may further define environmental activities (see paragraph 1 of Schedule 1).

PART 2 – POWERS OF ENTRY AND ASSOCIATED POWERS

Clause 6: Repealing, etc. unnecessary or inappropriate powers of entry, etc.

Clause 6 gives the Department the power, exercisable by regulations, to remove from existing legislation powers to enter land or other premises which it considers to be either unnecessary or inappropriate. Such regulations may also remove associated powers, for example, a power to search or inspect the premises entered into or to seize material found in such premises; the term is defined in clause 13(1). The power to remove an associated power may be exercised independently from the power to remove a power of entry (and vice versa). Clause 6 also gives the Department the power to remove from existing legislation offences (as described in clause 8(1)(b)) connected with the powers of entry and associated powers.

Clause 7: Adding safeguards to powers of entry

Clause 7(1) gives the Department power, exercisable by regulations, to add safeguards to powers of entry or associated powers. Subsection (2) sets out a non-exhaustive list of the safeguards which may be included in such regulations. Any such safeguards would be in addition to those already contained in the legislation conferring the power of entry or associated power.

Clause 8: Rewriting powers of entry

Clause 8 gives the Department the power, exercisable by regulations, to rewrite powers of entry or associated powers. Such regulations might consolidate a number of powers of entry exercisable for similar purposes. The power extends to rewording related legislation and connected offences. Whilst regulations under this clause may alter a power of entry or associated power and any safeguard linked to such powers, the combined effect of the changes must be to add to the level of protection afforded by the safeguards when taken together (subsection (5)).

Clause 9: Review of powers of entry

Clause 9 places a duty on the Department to conduct a review of powers of entry and associated powers within 2 years of the coming into operation of this section. In conducting a review the Department must consider whether, in relation to each power of entry (and associated power), to exercise the regulation making powers in sections 6, 7(1) or 8(1). A report of the review is to be prepared and laid before the Assembly.

Clause 10: Consultation requirements

Clause 10 requires the Department, before making regulations relating to a power of entry or associated power or an offence connected with the exercise of any such power, to consult with appropriate persons representing the views of stakeholders pertinent to such powers.

Clause 11: Regulations

Clause 11 provides that regulations made by the Department under section 6, 7(1) or 8(1) may modify any statutory provision or include such consequential, incidental, supplementary, transitional or saving provisions as the Department considers appropriate.

Clause 12: Code of practice in relation to powers of entry

Clause 12 places a duty on the Department to prepare a code of practice in relation to the exercise of powers of entry and associated powers under statutory provisions under which the Department has a function related to environmental activities or protecting and improving the environment. The Department is required to publish a draft of the code, invite representations on it and consider them. It must publish the finalised code and review it from time to time.

Subsection (6) provides that a person must have regard to the code of practice when exercising the powers of entry or associated powers to which the code relates. Failure to adhere to any aspects of the code would not, of itself, render a person liable to civil or criminal proceedings (subsection (7)) however, the code is admissible in such proceedings (subsection (8)) and a court or tribunal may take into account any failure of a person to comply with the duty to have regard to the code (subsection (9)).

Clause 13: Interpretation

Clause 13 defines terms used in Part 2.

PART 3 - AMENDMENTS TO THE CLEAN AIR (NORTHERN IRELAND) ORDER 1981

Clause 14: Authorised fuel

Clause 14 simplifies the procedure for declaring a fuel to be an authorised fuel for the purposes of the Clean Air (Northern Ireland) Order 1981 (“the 1981 Order”). It replaces the definition of “authorised fuel” in Article 2(2) of the 1981 Order with a new definition. The new definition provides that authorised fuel means a fuel that is included on a list of authorised fuels published by the Department. Previously the Department authorised fuels by regulations.

Clause 15: Exempt fireplaces

Clause 15 simplifies the procedure for exempting classes of fireplace from the provisions of Article 17 of the 1981 Order. Under the amended procedure the Department must publish a list of those classes of fireplace that are exempt. Previously the Department exempted classes of fireplace by regulations.

PART 4 – AMENDMENTS TO THE ENVIRONMENT (NORTHERN IRELAND) ORDER 2002

Clause 16: Removal of assessments under Article 13

Clause 16 removes the requirement in Article 13 of the Environment (Northern Ireland) Order 2002 (“the 2002 Order”) for district councils to undertake a Further Assessment of air quality in Air Quality Management Areas.

Clause 17: Amendments consequential on the amendments to Article 13

Clause 17 makes consequential amendments to the 2002 Order.

PART 5 – AMENDMENTS TO THE WATER AND SEWERAGE SERVICES (NORTHERN IRELAND) ORDER 2006

Clause 18: Enforcement authorities

Clause 18 makes various amendments to the Water and Sewerage Services (Northern Ireland) Order 2006 (“the 2006 Order”) which transfer responsibility for water quality enforcement action functions and duties in respect of the public supply from DRD to DOE and allows DOE to gain premises entry and access rights for the purposes of water contamination investigation of private and public water supplies.

Clause 19: Regulations relating to wholesomeness of water

Clause 19 makes various amendments to the 2006 Order which transfer sole power from DRD to DOE for making regulations which set out the standards and requirements which must be met for water to be considered wholesome and the responsibilities of a water undertaker with regard to fulfilling its duties to provide wholesome water.

Clause 20: Appointment and powers of inspectors

Clause 20 makes various amendments to the 2006 Order which transfer sole power from DRD to DOE to appoint officers to act on its behalf for the purposes of enforcing the relevant legislation relating to water quality of both private and public water supplies.

Clause 21: Publication of certain information and advice

Clause 21 amends the 2006 Order to provide DOE with the powers to publish information in respect of its functions relating to both public and private water supplies.

Clause 22: Transitional provisions

Clause 22 inserts a new Article 302A into the 2006 Order which sets out transitional provisions to ensure that there is no effect on, or alteration to, previous actions and regulations made by ‘the Department’, i.e. DRD, under the powers and functions of the 2006 Order which are now transferred fully to DOE by this Bill.

PART 6 - MISCELLANEOUS AND SUPPLEMENTARY

Clauses 23 to 27

Clauses 23 to 27 deal with the Assembly procedures to be followed in relation to regulations and orders under the Bill, interpretation, repeals and revocations, commencement and the title of the Bill.

SCHEDULE 1: MATTERS FOR, OR IN CONNECTION WITH, WHICH REGULATIONS MAY BE MADE UNDER SECTION 2

Schedule 1 specifies matters for, or in connection with, which regulations may be made under section 2.

Paragraph 1: Environmental activities

Paragraph 1 enables the regulations to further define or amend the definition of environmental activities, or to specify additional environmental activities

Paragraph 2: Emissions

Paragraph 2 enables the regulations to establish emission standards and requirements and to authorise making of plans for emission limits and quotas.

Paragraph 3: Emissions trading scheme

Paragraph 3 authorises the making of emissions quota trading or transfer schemes and makes provision for penalties in respect of contravention of a scheme.

Paragraph 4: Regulators

Paragraph 4 enables the regulations to specify the authorities on whom regulatory functions are conferred (defined as “regulators”), and enables the Department to give guidance and

directions to regulators. It also provides for empowering regulators to appoint persons to exercise functions and powers conferred by the regulations, and to confer powers on persons so appointed.

Paragraph 5: Regulation of activities

Paragraph 5 enables the regulations—

- to prohibit the carrying out of a regulated activity,
- to prohibit the carrying out of a regulated activity unless authorised by or under regulations, or
- to authorise the carrying out of a regulated activity in accordance with a permit, or subject to a requirement to register the carrying on of the activity, or subject to compliance with “general environmental rules” (see also clause 4 in that respect).

Paragraph 6: Permits

Paragraph 7: Registration

Paragraph 8: Provisions common to permits and registration

Paragraphs 6, 7 and 8 enable the regulations to specify the procedures relating to authorisation of regulated activities by permits and registration. The effect of these paragraphs is to allow for detailed procedural provisions to be included in the regulations governing how an application for the permit or registration may be made, how that application will be assessed and how a permit or registration may be granted. They also provide a framework for the extent to which the regulations may allow requirements to be imposed in permits and registrations, as well as allowing regulations to provide mechanisms for transfer, variation, and consolidation, and for suspension and revocation of permits or registration (together with a requirement to take associated preventative or remedial action). These provisions also enable the regulations to specify when registration may be refused and when a registration may lapse.

Paragraph 8 also allows provision to be made in connection with permits or registrations for multiple activities or for activities across multiple sites or for multiple persons to be granted a permit or registration. It allows “standard rules” provision to be made, and provides the basis for the fit and proper person test to be applied before a permit or registration is granted to a person or transferred, and to allow a permit or registration to be varied, suspended or revoked if the operator has ceased to be a fit and proper person.

Paragraph 8 also provides for requirements for remedial /preventative action to be taken where a permit or registration has been surrendered, suspended or revoked which could be in addition to any conditions of the licence (sub-paragraph (11)).

Paragraph 8 also provides for any person whose consent would be required before any works could be carried out under sub-paragraph (11) (most frequently the landowner) to be required

to grant to the licence holder, or join in granting, such rights as will enable them to comply with the condition.

Paragraph 9: Determination of matters by regulators

Paragraph 10: Making of rules and imposition of conditions

There are supplementary provisions at paragraphs 9 and 10. Paragraph 9 allows regulations to make provision for anything in paragraphs 6 to 8 which could be provided for by the regulations to be instead determined by the regulators. Paragraph 10 allows regulations to provide for the Department and regulators to have regard to specified principles and for regulators to have regard to any directions or guidance in imposing conditions.

Paragraph 11: Charging schemes

Paragraph 11 enables the regulations to authorise the Department to charge fees or make, vary or revoke schemes imposing charges in respect of the testing, sampling and analysis of substances, and assessing the effect on the environment of the release of such substances. These charges can be imposed prior to the grant of a permit or registration or in assessing compliance with the condition of a permit or registration. Paragraph 11 also enables charges to be authorised under the regulations, and the making, etc. of charging schemes by the Department, in respect of, or in respect of applications for, the grant of a permit and the variation, transfer, surrender or revocation of a permit or registration. It also applies to charges in respect of the subsistence or consolidation of permits and registrations and other specified matters. Paragraph 11 also enables the regulations to regulate the procedures for the making of such schemes.

Paragraph 12: Information, publicity and consultation

Paragraph 12 enables the regulations to secure that publicity is given to specified matters, and that public registers are maintained by regulators in respect of such matters. They enable persons to be required to provide information and/or compile information on emissions, energy consumption and energy efficiency, and waste. They also enable the regulations to require or authorise regulators to carry out consultation in connection with the exercise of any of their functions. Paragraph 12 also enables the regulations to authorise regulators to hold a public local inquiry in respect of the exercise of any of their functions and for them to take account of any representations made as a result of any inquiry.

Paragraph 13: Enforcement and offences

Paragraph 13 enables the regulations to confer functions on regulators with respect to compliance with, and enforcement of, the regulations. This includes conferring a power to arrange for preventative or remedial action to be taken at the expense of the persons carrying on a regulated activity and to arrange for the taking of samples or making copies of information. It also enables the regulations to authorise regulators to serve various notices on persons carrying on regulated activities.

It also enables the regulations to provide that regulators may require any person served with such a notice to pay the costs incurred up to the date of service of the notice. It enables the regulations to provide for enforcement of notices in the High Court. It enables the regulations

to create offences and provide for defences and evidentiary matters and allows offences to be triable summarily only or on indictment. It also provides the maximum punishments for the offences that may be set out in the regulations and enables regulations to provide for a court to be able to order remedial action where a person has been convicted of an offence and for that person to pay to a regulator the investigation costs incurred by the regulator.

Paragraph 14: Appeals

Paragraph 14 enables the regulations to provide for rights of appeal for various matters, and for the determination of such appeals as well as the payment of associated fees or costs.

Paragraph 15: Compensation

Paragraph 15 enables provision to be made to make a regulator liable to pay compensation to any person in respect of any loss or damage sustained by them as a result of certain action taken by the regulator, e.g. the revocation or modification of a permit in certain circumstances. It also enables compensation to be payable by a permit/registration holder to a landowner/landlord in such circumstances. Sub-paragraph (3) expressly expands the regulation making powers in relation to compensation to provide, for example, the basis on which any amount paid is to be assessed, when and how applications may be made and providing for the persons or bodies by whom, and the manner in which, any dispute is to be determined.

Paragraph 16: Service of notices and other documents

Paragraph 16 enables provision to be made for the service of notices or other required documents.

Paragraph 17: Application to the Crown

Paragraph 17 provides the application of the regulations to the Crown.

Paragraph 18: Interpretation

Paragraph 18 contains definitions of various terms used in the Schedule.

SCHEDULE 2: REPEALS

Schedule 2 lists the repeals brought in by the Bill.

SCHEDULE 3: REVOCATIONS

Schedule 3 lists the revocations brought in by the Bill.

FINANCIAL EFFECTS OF THE BILL

19. The main additional public sector financial costs are expected to be those which emanate from those aspects of the Bill associated with the Department's Regulatory Transformation Programme (Parts 1 and 2 of the Bill), for example, development of legislation, modifications to existing Departmental IT systems, staff training and

guidance to businesses. Fuller details of what these costs are likely to be will be a matter for the Regulatory Impact Assessments which will accompany the substantive subordinate legislation programme to be developed in order to give effect to Parts 1 and 2 of the Bill. It is anticipated that the likely benefits to businesses arising from the implementation of the future subordinate legislation programme in terms of more efficient and effective regulatory processes should offset any potential increase in public sector financial costs.

20. No significant additional public sector financial implications have been identified in respect of the miscellaneous amendments in Parts 3, 4 and 5 of the Bill.

HUMAN RIGHTS ISSUES

21. The Department considers the provisions of the Bill to be compatible with the European Convention on Human Rights.

EQUALITY IMPACT ASSESSMENT

22. Under the terms of section 75 of the Northern Ireland Act 1998, the Department carried out screening for equality impact and is satisfied that the provisions in the Bill will not lead to discriminatory or negative differential impact on any of the section 75 groups.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

23. A Regulatory Impact Assessment (RIA) is published alongside the Environmental Better Regulation Bill. Copies are available from the Department of the Environment, Regulatory and Natural Resources Policy Division, Goodwood House, 44-58 May Street, Belfast BT1 4NN.
24. A key aim of the Bill is to reduce regulatory burdens on business. The Bill has been assessed to determine any regulatory impact and it is considered that it does not contain any provisions that will result in increased or adverse impact on businesses. The proposed measures in the Bill will bring the regulatory system in Northern Ireland more in to line with those in place in the rest of the UK. Reductions in environmental regulatory burdens as a result of measures in the Bill will be realisable for businesses which are subject to multiple permissions and those which present a low environmental risk rather than those in particular business sectors.
25. The Bill objectives can only be achieved by legislative change and the RIA has shown the existence of cost savings or other tangible benefits are sufficient to justify legislative change.

LEGISLATIVE COMPETENCE

26. The Minister of the Environment had made the following statement under section 9 of the Northern Ireland Act 1998:

“In my view the Environmental Better Regulation Bill would be within the legislative competence of the Northern Ireland Assembly.”