
BY E-MAIL ONLY

11th May 2009

To: eppadministrator@defra.gsi.gov.uk

From: guy.linleyadams@fishlegal.net

Dear Sirs,

CONSULTATION ON THE SECOND PHASE OF ENVIRONMENTAL PERMITTING PROGRAM (EPP 2)

Please find attached a response to the above consultation on behalf of Fish Legal.

This response is also supported by the Association of Rivers Trusts, the Salmon and Trout Association, the Wildfowl and Wetlands Trust, the Royal Society for the Protection of Birds (RSPB) and the Worldwide Fund for Nature (WWF-UK).

We have no objection to the publication of this response.

Yours sincerely,

Guy Linley-Adams
Solicitor

CONSULTATION ON THE SECOND PHASE OF ENVIRONMENTAL PERMITTING PROGRAM (EPP 2)

Fish Legal has narrowed down its responses to the following areas of concern:

1. Proposal 4 - generally binding rules
2. Proposal 8 / Question 3 - the 'four year rule';
3. Proposal 10 - the duty to review and inspect;
4. Proposal 13 - the relationship of the EPP Regulations and the EU Directive 2003/4/EC on public access to environmental information; and
5. Proposal 18 / Question 4 - the effect of appeals

1. Proposal 4

Fish Legal is supportive of the application to small sewage discharges in England and Wales of generally binding rules, conditional, of course, on those generally binding rules being sufficiently stringent to avoid pollution of watercourses.

Fish Legal would urge DEFRA and regulatory bodies to consider that such discharges may occur to extremely small receiving waters which have significant value for fish, particularly nursery areas.

Fish Legal would be concerned to see generally binding rules allow what, in all probability, will be uninspected or very rarely inspected discharges to cause damage to such small watercourses. The rules must therefore be sufficiently strong to ensure that, should such damage occur, in all likelihood in the absence of monitoring by regulators, there will still be sufficient scope for successful legal proceedings to be brought by the regulator.

2. Proposal 8 / Question 3

Fish Legal believes the four year rule in relation to discharge consents should be scrapped and agrees with all the arguments put forward in paragraph 4.30 in favour of the removal of that rule.

There is already sufficient scope for challenging revocations or variations of environmental permits, whether within or without the four year period, by the standard appeal procedure.

The water industry's periodic review process is insufficient reason to justify discharges from water industry infrastructure being treated differently from any other discharge. If the purpose behind the Environmental Permitting Program is to standardise permitting across environmental regulatory regimes, then this anomaly must be removed.

3. Proposal 10

Fish Legal strongly supports the introduction to the discharge consent system of a duty to inspect and review.

While the success of any such duty will largely depend upon the frequency of inspection and review, this is an improvement on the current system where, in some circumstances, there is no regular inspection and review at all.

As a result, this duty is likely to have the effect of bringing historically polluting discharges, currently consented but essentially overlooked, under better control.

4. Proposal 13

In relation to the confidential information appeals procedure, Fish Legal does not believe that draft Regulations 45 to 56 are compatible with the Directive 2003/4/EC on public access to environmental information, for the following reasons:

i) "Emissions"

Article 4(1) of the EC Directive provides that confidentiality cannot be used as a ground to refuse to supply environmental information to any person "where the request relates to information on emissions into the environment".

The decision of the Information Tribunal in the recent OFCOM case was that "emissions" as it appears in the Directive and the 2004 Regulations was not subject to some narrow definition, but "should be given its plain and natural meaning".

Information generated by the EPP process must, by definition, be "information relating to emissions" and cannot properly be subject to confidentiality.

We believe that Regulation 48 should be amended, for clarity, to give the regulator a specific duty not to exclude, ab initio, any information from the Register if it relates to "information on emissions".

ii) Time allowed for the provision of information

Article 3(2) of 2003/4/EC states that "environmental information shall be made available to an applicant as soon as possible or, at the latest, within one month after the receipt by the public authorityof the applicant's request."

EPP information, potentially to be included upon the public register, could, under the current draft of the Regulations, be subject to being withheld from the public register for a period in excess of that allowed under Article 3(2).

Whatever primary procedure is to be put in place for determining firstly whether information relates to information on emissions and if not, whether it should be subject to commercial confidentiality, that procedure should take no longer than one month as required by Article 3(2) of Directive 2003/4/EC.

In particular, the effect of draft Regulation 52(1)(b) could be to prolong indefinitely the appeals procedure. As such, draft Regulation 52(1)(b) is clearly incompatible with Directive 2003/4/EC and must be removed.

iii) Appeals

Regulation 53 gives to the information subject a right of appeal on grounds of confidentiality to the appropriate authority, ie to Ministers. We believe this would more properly be made to the Information Commissioner, to bring this into line with system set up under the Freedom of Information Act 2000. We suggest Regulation 53 is re-drafted to make the Commissioner the appellate authority.

Further, Regulation 53 does not allow a user of the public register (as opposed to an information subject) any right of appeal against the exclusion of information from that register on grounds of confidentiality, even though such a person will have notice of the existence of withheld information, under Regulation 46(8).

Pursuant to Article 6 of Directive 2003/4/EC, a user of the register must be able to so appeal.

The draft EPP Regulations are therefore not compatible with Article 6 of the EC Directive and require amendment to allow such appeals by users of the public register.

iv) Provision of the Register by electronic means

Both Article 1 and Article 7 of Directive 2003/4/EC require the UK to take the necessary measures, quoting Article 7, to “ensure that public authorities organize... environmental information.....with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available”.

Further, Member States are required to “ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks”.

We do not believe the Regulations would be compatible with Directive 2003/4/EC unless the public registers envisaged are made available on-line.

In addition, if an on-line register is set up, we see no practical need for any information to removed from the public register pursuant to Schedule 23 paragraphs 2 or 3 of the Regulations.

Such removal would also be contrary to Directive 2003/4/EC, as this information does not cease to be environmental information as defined by the Directive, merely by virtue of its age. Provisions to allow the removal of information from the registers are therefore in breach of Article 7 and the objectives of that Directive.

Proposal 18 / Question 4

Fish Legal disagrees with government proposals to maintain the current discharge consenting procedure so that appeals against variations made to discharge consents by the regulator, or against the imposition of conditions on unconditional discharge consents, continue to have the effect of suspending the regulator’s decision, pending the outcome of the appeal.

The water industry has used the appeal mechanisms within the current discharge consent procedure to delay and ‘kick into the long grass’ improvements in discharge performance required by the Environment Agency in pursuance of European Directives.

In May 2007, the Anglers’ Conservation Association, the forerunner to Fish Legal, obtained information from the Environment Agency relating to the number of appeals made by water companies since 1994 against new or varied discharge consents or revocations of discharge consents. That figure was 2566 appeals. At January 2007, a very large proportion, 1413 of those appeals, were still outstanding.

Note that whereas Welsh Water had only lodged 3 appeals out of the total of 2566, South West Water had lodged 679, United Utilities 612 and Yorkshire Water 541. It is clear that this has placed an extraordinary burden upon Environment Agency officers dealing with the backlog of appeals, particularly in the United Utilities / north-west region.

Fish Legal believes that the water industry collectively would be far less likely to appeal against such variations etc, if the variations took effect irrespective of the duration of the appeals. As the ACA then pointed out, the effect of the severe backlog of appeals has been to threaten UK compliance with EU directives, particularly the Urban Waste Water Treatment Directive.

Towards the end of 2007 and into 2008, the ACA highlighted to the Agency almost 4000 deemed consents, largely in existence as a result of temporary consent granted at the time of water privatisation, that still needed determination. It was made clear to the ACA by the Environment Agency that any proposed conditions to be placed on those temporary consents from the time of privatisation would have to be so neutral in their effect as to avoid a raft of new appeals from the water industry. The Environment Agency feared the deliberate use of the appeal system to prevent improvements to the performance of such discharges and to tie the Agency into an extremely bureaucratic exercise for months if not years. Specifically, the Head of Water Quality for the Agency in September 2007 stated that he was hoping to deal with these deemed and temporary consents *“without requiring major effort of generating a massive set of appeals”*.

In short, Fish Legal believes that a more forceful approach is required, ensuring that environmental permits subject to appeal, irrespective of the regime concerned, are not suspended.

End