

Delegated Powers and Law Reform Committee
Tuesday, 11th March 2025
9th Meeting, 2025 (Session 6)

Instrument Responses

Environmental Authorisations (Scotland) Amendment Regulations 2025 (SSI 2025/Draft)

NB: the original instrument to which these questions relate was withdrawn by the Scottish Government on 9th December 2024. The instrument considered by the Committee at this meeting was re-laid on 27th February 2025.

On Friday 6th December 2024, the Committee asked the Scottish Government:

1. On page 9, regulation 9 substitutes regulation 6 of the 2018 Regulations. It omits regulation 6(3), which gave effect to schedule 8. However, each of the new schedules, at the top right of the page, refers to regulation 6(3) as being the provision which introduces them. Was the intention to insert a new regulation 6(3) to give explicit effect to the new schedules, or is the reference in the schedules to regulation 6(3) incorrect? In the event that it was a drafting choice not to give explicit legal effect to the new schedules, would this result in an inconsistency in that the 2018 Regulations, as amended by this instrument, still explicitly give effect to schedules 1 to 7?
2. Is it sufficiently clear how the terms “hazardous waste” and “non-hazardous waste” in new schedules 10, 13 and 19 are defined? We note that there is a definition of “hazardous waste” for the purposes of schedule 12 and schedule 22.
3. On page 21, regulation 40(g)(aa) states for “column 3” substitute “column 3” – is this the intention as these are the same?
4. On page 29, in activity 10C in the “Water” table, paragraphs (d)(i), (ii) and (iii) reference 1 April 2007 whereas the activity is “the discharge of water run-off from a quarry or borrow pit constructed on or after 1 January 2022”. Are the references to 1 April 2007 intended?
5. On pages 53-54, in activity 28 in the “Water” table, paragraph (f)(ix)(cc), is there something missing at the end of the sentence?
6. On page 83, in new schedule 10 (Water activities), paragraph 6(1)(b), should the reference to regulation 4 to 7 of SSI 2013/325 be instead to regulations 3 and 4 to 7, in line with the reference in paragraph 6(1)(a) to the equivalent provisions of SSI 2013/323? Regulations 4 to 6 operate as conditions on the application of regulation 3.
7. On page 83, new schedule 10, paragraph 6(1)(a) and (b) require SEPA to carry out its relevant functions in relation to water activities to secure, among other things, the achievement of the environmental objectives set for water bodies and

for shellfish water protected areas in accordance with provisions of SSI 2013/323 and SSI 2013/325 respectively. Regulation 3 of each of these two SSIs provides that the objectives set in this regard, subject to the application of other provisions, have a target date of 22 December 2015. This date has passed, and the present instrument does not amend it. Does the new provision in schedule 10 paragraph 6(1)(a) and (b) operate correctly given this date?

8. On page 87, in new schedule 11 (Waste management activities), paragraph 6(3)(a), is “under” (or words to the same effect) missing between “waste treatment” and “paragraph 5”?
9. On page 91, in new schedule 13 (Landfill activities), paragraph 4:
 - (1) the definition of “definite closure” refers to paragraph 13(3) which does not exist.
 - (2) the defined term “L/S = 10 1/kg” refers to “one kilogram”, and it is a number one in the figure “1/kg”, but where the term is used in the other places in the Regulations the letter “l” is used: “l/kg”. Which is correct?
10. On page 92, in new schedule 13, paragraph 4, final line, should the reference be to paragraph 29(4) of the schedule instead of (or as well as) paragraph 12(c)?
11. On page 92, in new schedule 13, paragraph 5(1)(a) provides that the schedule does not apply to remote landfills which had capacity on 10 April 2003, is this the correct date?
12. On page 93, in new schedule 13, paragraph 6(h) provides that an application for authorisation for a landfill activity must contain, among other things: (h) where an EIA is required under SSI 2017/102, “the information provided by the developer” in accordance with regulation 5 of that SSI. Regulation 5 specifies the information that must be contained in an EIA report, not information to be provided by the developer. Is paragraph 6(h) sufficiently clear?
13. On page 100, in new schedule 13, paragraph 20(2) says “subject to sub-paragraph (4)” but there is no sub-paragraph (4). Is this an incorrect cross reference?
14. On page 102, new schedule 13, paragraph 21(2) provides (in effect) that waste that may be accepted without testing at landfills for non-hazardous waste must meet the criterion that “(a) it must have been subject to prior treatment in accordance with paragraph 10 of this schedule”. The purpose of paragraph 10(1) is to ensure that a landfill is used only for the disposal of waste that has been subject to prior treatment except in specified circumstances, in which case prior treatment is not required. Is paragraph 21(2) intended to identify only those types of landfill which have required to undergo and have undergone prior treatment under paragraph 10, or it is just intended to be a reference to waste that meets the requirements of paragraph 10(1) generally?
15. On page 107, in new schedule 13, paragraph 28:

- (1) Paragraph 28(1) provides that the temporary storage of mercury for more than one year must comply with the requirements in sub-paragraphs (2) to (4). The paragraph has five further sub-paragraphs, (5) to (9). When do these apply, or should paragraph 28(1) refer to sub-paragraphs (2) to (9)?
- (2) Paragraph 28(3)(e) refers to the drop test and leakproofness tests in a UN document from 2011. It appears that this version of the Manual is no longer available online. Are the relevant tests set out in what appears to be a more recent version, which is available online [here](#), and, if so, could reference be made to that version instead?
- (3) Paragraph 28(3)(g) refers to a certificate. Is this the certificate mentioned in sub-paragraph (6), and if so, should this be made clear?
16. On page 110, in new schedule 13, paragraph 33, table 11, footnote (2) provides that the entries in the table for leachate volume and composition do not apply where leachate collection is not required under paragraph 40(2). Paragraph 40(2) does not appear to indicate circumstances in which collection is not required. Is the reference to paragraph 40(2) correct?
17. On page 112, in new schedule 13, should a location be specified in paragraph 38(1)(b), e.g. waterways, water bodies and other agricultural sites “in the area”, in line with the other heads in sub-paragraph (1), each of which specifies either a distance or location?
18. On page 115, in new schedule 13, paragraph 45(11) provides that the authorised person must, on a leak being detected, (b) treat the leak as causing significant environmental “harm” for the purposes of paragraph 13. Paragraph 13 refers to significant environmental “effects”. Should the reference in paragraph 45(11) be to “effects”?
19. On page 117, in new schedule 14 (Separately collected recyclable waste), paragraph 4, should the reference to “separately collected recyclable waste” be to the defined term “separately collected waste”? The headings of schedule 14 and paragraph 4 also refer to “separately collected recyclable waste” rather than the defined term.
20. On page 176, in new schedule 22 (Scope and interpretation), is the reference to subparagraph (g) in paragraph 6(j) correct?
21. On page 176, in new schedule 22, is the reference to paragraph 9(4)(c) correct?
22. On page 189, in new schedule 22, there appears to be a missing sub-paragraph (3) in paragraph 24, which is then referred to in paragraph 24(6).
23. On page 233, in new schedule 26 (Other emissions activities), is the reference in paragraph 70(2)(e) to “paragraph 34 of Chapter 4 of Part 4 of schedule 20” correct?

24. On page 254, in schedule 21 (Repeals and revocations), paragraph 1, repealing provisions of the Environmental Protection Act 1990, why is section 43(2) of the 1990 Act being retained (appeals to the Secretary of State may be in the form of a hearing etc)?
25. On page 264, in schedule 22 (Consequential amendments), paragraph 6 makes a consequential amendment to the Goods Vehicles (Licensing of Operators) Act 1995, to replace the reference to an offence under section 1 of the Control of Pollution (Amendment) Act 1989 with reference to an offence under regulation 69 of the 2018 Regulations. An offence under the former provision is (only) an offence of transporting controlled waste without registering. The latter provision refers generally to offences under the 2018 Regulations. Is the result of this provision that conviction for any of the offences in paragraph 69 will be a notifiable conviction under the Goods Vehicles (Licensing of Operators) Act 1995, and is this the intention?
26. On page 275, in schedule 23 (Transitional and savings provisions), paragraph 1, in the definition of “existing waste exemption”, sub-paragraph (c) provides: “where that registration has effect immediately before the waste exemptions sunrise date”. Should “sunrise” be “sunset”?
27. On page 275, in schedule 23, are the definitions “existing PPC Part A permit” and “existing PPC Part B permit” correct, as the body of the text refers to “existing Part A/B PPC permits”.
28. On page 281, in schedule 23, paragraph 16(3) allows for a short application period of 4 months to submit an application to operate an existing medium combustion plant where the rated thermal input of the plant is equal to or greater than 1 and less than or equal to 5 megawatts. Is the application period correct?
29. On page 281, in schedule 23, paragraph 15(4), table 1, are the references to paragraphs 70 and 71 correct (that is, are they intended to be references to paragraphs 70 and 71 in Part 3 of new schedule 26 of the 2018 Regulations), and if so, it is sufficiently clear which activities in paragraphs 70 and 71 are being referred to?
30. On page 287, in schedule 23, paragraph 28(1) - why does this paragraph only apply to notices on or after 10 October 2025 and not to all notices before the relevant date?
31. On page 289, in schedule 23, is the title reference in relation to paragraph 14 of schedule 27 correct?
32. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 10th December 2024, the Scottish Government responded:

This instrument is no longer before the Parliament, having been withdrawn in response to a request from the Convener of the Net Zero, Energy and Transport Committee. However, the points raised will be considered before the instrument is re-laid.

Education (Scotland) Act 1980 (Modification) Regulations 2025 (SSI 2025/44)

On Friday 28th February 2025, the Committee asked the Scottish Government:

The enabling power in subsection (8) of section 53 of the Education (Scotland) Act 1980 (“1980 Act”) permits the Scottish Ministers to modify sub-section (7) by “adding” a description of a pupil.

This instrument omits, rather than adds, such a description. (It omits paragraph (aa) of sub-section (7).)

We appreciate that, since paragraph (aa) was inserted by a Scottish instrument (SSI 2019/179), there would be power to remove paragraph (aa) by amending or revoking that instrument (by virtue of the Interpretation and Legislative Reform (Scotland) Act 2010, section 6).

However, we would be grateful if you could set out why you consider that modifying sub-section (7) directly by omitting paragraph (aa) is permitted by the enabling power.

Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 4th March 2025, the Scottish Government responded:

Section 53(8)(a) of the Education (Scotland) Act 1980 (“the 1980 Act”) confers a power on the Scottish Ministers to make regulations to modify section 53(7) of the 1980 Act by adding a description of pupil by reference to (i) any benefit or allowance received by the pupil, or the parents of the pupil, in such circumstances as may be prescribed in the regulations and (ii) any tax credit, or element of a tax credit, within the meaning of the Tax Credits Act 2002 received by the pupil, or the parents of the pupil, in such circumstances as may be so prescribed.

Section 53(8)(a)(i) of the 1980 Act is the power that has been relied upon for the provision in regulation 2(b) of the Education (Scotland) Act 1980 (Modification) Regulations 2025 (“the 2025 Regulations”) to amend the reference to eligibility on the basis of receipt of universal credit, subject to a maximum income level.

Section 53(8)(a)(ii) of the 1980 Act is the power that has been relied upon for the provision in regulation 2(a) of the 2025 Regulations to omit the reference to eligibility on the basis of receipt of certain tax credits (Child Tax Credit and Working Tax Credit), subject to a maximum income level.

Enabling powers are, like all legislation, subject to interpretation. Although the enabling power in section 53(8)(a) of the 1980 Act specifically refers to “adding” a description, we are of the view that modifying by “adding” amounts to the same as making provision, and so there is an implied power to revoke any provision previously added to section 53(7) of the 1980 Act.

The Interpretation Act 1978 (“the 1978 Act”) is considered to be the relevant interpretation code that applies to the 2025 Regulations by virtue of section 23(1) of the 1978 Act. Section 14 of the 1978 Act provides that where an Act confers power to make rules, regulations or byelaws; or Orders in Council, orders or other subordinate legislation to be made by statutory instrument, it implies, unless the contrary intention appears, a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re-enact any instrument made under the power.

Craies (13th ed., at 22-023) provides the following on section 14 of the 1978 Act:

There is a clearly understandable purpose in the inclusion of this section. If it were not there, the power (say) to impose requirements by regulations on the labelling of food could not, on a literal interpretation, be used to make amending regulations to remove a requirement made by previous regulations under the same power, as the removal would be the opposite of what the power provides. A consistent way of applying s.14 is to ask the question: taking the original and the amendment together, is the end result compatible with the enabling power? If the answer is “yes”, it is then intra vires to make the amending regulations. The same principle applies with revoking regulations even with no replacing regulations (so far as exercise of the enabling power is and remains a matter of discretion).

This rebuttable presumption—that a power to legislate includes an implied power to revoke, amend and re-enact legislation—(...) applies to any power to make rules, regulations, byelaws and Orders in Council.

We do not consider that there is a basis for a distinction between revoking the amending (2019) instrument and revoking the words the instrument inserted into the 1980 Act. The effect would be the same.

An alternative reading of section 53(8)(a) of the 1980 Act which would render revocation of provisions previously added to section 53(7) of the 1980 Act impossible could not have been what the Scottish Parliament intended when passing the Education (Scotland) Act 2016 which substituted the current version of section 53 of the 1980 Act. It would lead to a cluttered and inaccessible statute book at best, and risk absurdity at worst.

Accordingly, no corrective action is proposed.