

Memorandum

To	P226 Modification Group	cc
From	Diane Mailer	
Date	27 October 2008	
Subject	Scope of P226 Modification Proposal	

The Group has asked me to consider whether Proposed Modification P226, as drafted, includes large combustion plants in Scotland or is limited to England and Wales.

It is argued that the Proposal is ambiguous on this point because it makes reference to the Environment Agency ("EA") and not the Scottish Environment Protection Agency ("SEPA"). On balance I consider that the intention is sufficiently clear that the proposal should be construed to include Scotland. My reasoning is discussed below.

Proposal

The introductory paragraph of the Proposal sets the scope of the Proposal. It states that it 'seeks to enhance the visibility of key Large Combustion Plant Directive (LCPD)' limits, which affect how BSC parties make such plants available to the market. The terms LCPD and BSC Parties apply across the UK. The insertion of 'key' before LCPD denotes a carve out of LCPD plants. This is broadly defined as 'larger generators exporting on a regular basis' and the detail is left open to the Modification Group to determine. Thus, the first paragraph demonstrates an intention that all 'larger generators' applicable to BSC Parties that fall under the LCPD are included and that certain smaller LCP are excluded.

The problem arises under paragraph four. This paragraph imposes additional obligations on BSC Parties in relation to the information required under points 6,7 & 8. In doing so it discusses points 6,7 & 8 with specific reference to the EA. It does not make mention of SEPA nor suggest in any way that certain LCP would make derogation applications to SEPA.

In light of the fact that the scope of the Proposal has been defined in paragraph one, the reference to the EA in paragraph four can arguably be construed as a generic reference to the applicable environment agency.

Further, reference to the EA represents the detail about how a derogation is made. It is not of itself necessary to the Proposal and should therefore be construed as secondary to the obligations themselves. The language of the obligations set out in points 1 to 8 is consistent with the scope of the Proposal set out in paragraph one.

I do not consider the fact that the Proposal is silent on SEPA is sufficient to undermine the stated scope of the Proposal. This view is supported by the provisions of the BSC.

BSC

Section F of the Code provides for Code Modification procedures. In particular, paragraph 2.1.2 provides that a proposal made pursuant to paragraph 2.1.1 shall be submitted in writing in accordance with BSCP40, and shall contain the information listed in this provision. Notably, the precise detail of the proposal is not required. Rather, a description of the issue and the proposed modification '(in reasonable but not excessive detail)'. It follows that proposals should be construed broadly.

A Proposal will generally only be rejected where it fails to comply with any material aspect of paragraph 2.1.3 not functional detail. In effect, the BSC enables the Panel to 'fill in the gaps' where a proposal is silent on such detail.

The omission of SEPA would not constitute a material fact. Rather, information concerning SEPA in the Description of the Proposal is detail that is not necessary to give effect to the Proposal. To this end the Panel could reasonably construe the Proposal to include SEPA.

Purposive approach

The Courts have held that legislation in the United Kingdom is to be interpreted in light of the purpose behind the legislation. Clearly, the Proposal is not legislation. However, given that the Proposal forms part of a legislative process it should arguably be construed in such a light. Such an approach is consistent with the modification process outlined in the Code.

These arguments apply to the same limitation highlighted in the 'Description of the Issue or Defect' component of the Proposal, although mention of EA is necessary in this instance.

Regards

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