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Environmental Permitting Guidance

Statutory Nuisance

s79(10) Environmental Protection Act 1990

**For the Environmental Permitting (England and Wales)
Regulations 2010**

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Version 1.1



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



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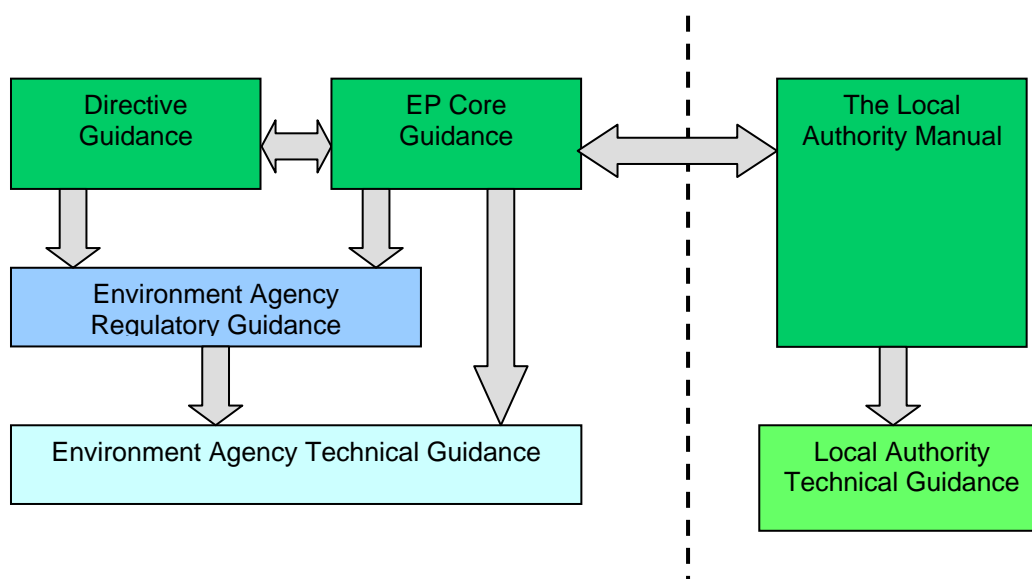
1. Summary

- 1.1 This Guidance is aimed at helping readers understand the interrelationship between the Environmental Permitting (England and Wales) Regulations 2010 SI 2010 No.675 (as amended¹) ('the Regulations') and the local authority's statutory nuisance powers under the Environmental Protection Act 1990 (the 'EPA 1990').
- 1.2 This Guidance is being published to help those regulating and operating sites, but it will also be of interest to others. The Guidance sets out the views of the Secretary of State for Environment, Food and Rural Affairs (Defra) and the Welsh Ministers on how the Directive should be applied and how particular terms should be interpreted. However, only the national or European Courts can give a definitive interpretation of the legislation.
- 1.3 In particular this Guidance advises on:
- local authority duties under Part III of the EPA 1990;
 - when and how the provisions of section 79(10) EPA 1990 apply;
 - the need for good communication between the local authority and Environment Agency;
 - the form and content of applications made by the local authority to the Secretary of State or Welsh Ministers; and
 - indicative criteria on which applications will be determined.
- 1.4 This Guidance is part of a series of documents which accompany the Regulations².

¹ Environmental Permitting (England and Wales) (Amendment) Regulations 2010 SI 2010 No.676 (see: www.defra.gov.uk/environment/policy/permits)

² *ibid*

Figure 1. Illustration of Guidance relationships



- 1.5 The series consists of the Environmental Permitting Core Guidance³, which describes the general permitting and compliance requirements, and Guidance on each of the European Directives implemented through the regime⁴. Separate Guidance is available where the local authority regulates⁵. This is illustrated in Figure 1.
- 1.6 This Guidance should be read in conjunction with the Environmental Permitting Core Guidance⁶. This Guidance expands on paragraph A.1.18 ‘Statutory nuisance’ in the Core Guidance.
- 1.7 To ensure this Guidance is current and up to date, from time to time this Guidance will be updated. Where made, revisions can be found in the ‘Revision of Guidance’ section at the front of the document.
- 1.8 This Guidance document is compliant with the Code of Practice on Guidance on Regulation⁷. If you feel this Guidance breaches the code, or notice any inaccuracies within the Guidance, please contact the EPP team at: eppadministrator@defra.gsi.gov.uk.

³ www.defra.gov.uk/environment/policy/permits

⁴ www.defra.gov.uk/environment/policy/permits

⁵ Available at

www.defra.gov.uk/environment/quality/pollution/ppc/localauth/pubs/guidance/manuals.htm

⁶ Available at www.defra.gov.uk/environment/policy/permits

⁷ See Environmental Permitting Guidance and Glossary Chapter 3: www.defra.gov.uk/environment/policy/permits

2. Interpretation of section 79(10) EPA 1990

Introduction

- 2.1 Under Part III of the EPA 1990 a local authority has a duty to inspect its area from time to time to detect any statutory nuisances and to take such steps as are reasonably practicable to investigate any complaint of a statutory nuisance made by a person living within its area.
- 2.2 Where a local authority is satisfied of the existence or of the likely occurrence or recurrence of statutory nuisance it must generally serve an abatement notice in accordance with section 80(2) of the EPA 1990. This may be served upon the person responsible for the nuisance, the owner of the premises where the nuisance arises from any defect of a structural character or the owner or occupier of the premises where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred.
- 2.3 Where a local authority detects a statutory nuisance from or receives a complaint of statutory nuisance arising from the operation of either:
- a “regulated facility” (including a waste operation, a Part A(1), Part A(2) or Part B installation, mobile plant, or a mining waste operation); or
 - an “exempt waste operation”,
- (as defined under the Regulations) it will need to consider the provisions of section 79(10) when discharging its duties under the EPA 1990, (as outlined in paragraph 2.2).

Section 79(10) EPA 1990

- 2.4 Section 79(10), EPA 1990, as amended and relevant to England and Wales, states:
- ‘A local authority shall not without the consent of the Secretary of State institute summary proceedings under this Part in respect of a nuisance falling within paragraph (b), (d), (e), (fb) or (g) of subsection (1) above if proceedings in respect thereof might be instituted under Part I or under regulations under section 2 of the Pollution Prevention and Control Act 1999.’
- 2.5 The Regulations were made under section 2 of the Pollution Prevention and Control Act 1999 (the ‘PPC Act 1999’) and are therefore relevant to section 79(10). Section 79(10) sets out the circumstances in which the Secretary of State or Welsh Ministers’ consent is required before a local authority can institute summary proceedings for the specified types of statutory nuisance. Its purpose is to avoid the operator of a regulated facility or exempt waste

operation being exposed to regulatory action by both the Environment Agency and the local authority for the same incident, i.e. to avoid 'double jeopardy'.

- 2.6 'Summary Proceedings', in the absence of any definition within the EPA 1990, means proceedings instituted in a court of summary jurisdiction – a magistrates' court⁸. This means that a local authority would not need consent from the Secretary of State or Welsh Ministers to serve an abatement notice or to take preceding actions leading to the service of the notice. The duties on a local authority (as detailed in paragraph 2.2) in relation to statutory nuisance remain, irrespective of whether the regulated facility or exempt waste operation is covered by the Regulations.

The Environmental Permitting Regulations

- 2.7 The Regulations came into force in April 2008 and brought the permitting of regulated facilities and registration of exempt waste operations under the new environmental permitting regime. In July 2009 the Regulations were amended to bring mining waste operations into the permitting regime. The changes resulted in a local authority requiring the Secretary of State or Welsh Ministers' consent to institute summary proceedings for certain statutory nuisances against waste operations that are permitted or are registered as exempt or mining waste operations that are permitted in the same way as they already were for Part A(1), A(2) and Part B installations and mobile plant.
- 2.8 The Environmental Permitting (England and Wales) Regulations 2010 bring three further regimes into the environmental permitting regime. These include:
- water discharge activities and exemptions;
 - groundwater activities and exemptions; and
 - radioactive substances activities and exemptions.
- 2.9 The provisions of section 79(10) are not considered likely to be relevant to these regimes as their permits or registrations will not normally include conditions or objectives relating to the control of substances or emissions that would address any of the relevant statutory nuisances. The risk of the operators being subject to 'double jeopardy' is therefore considered to be remote.

Circumstances when consent is required

- 2.10 A local authority will require the Secretary of State or Welsh Ministers' consent to bring summary proceedings for an offence under section 80(4) of the EPA 1990 against the operator of a regulated facility or an establishment or undertaking carrying on a registered exempt waste operation in the following circumstances. There are two parts to this qualifying nuisance and relevant activities, these are outlined further below.

⁸ *R (Ethos Recycling Ltd) v Barking and Dagenham Magistrates' Court* [2009] EWHC 2885 (Admin)

Qualifying nuisance

- (a) the statutory nuisance is listed in section 79(10)⁹, EPA 1990. For ease of reference these are:
- smoke emitted from premises so as to be prejudicial to health or a nuisance;
 - any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
 - any accumulation or deposit which is prejudicial to health or a nuisance;
 - artificial light emitted from premises so as to be prejudicial to health or a nuisance; or
 - noise emitted from premises so as to be prejudicial to health or a nuisance.

Relevant activities

- (b) proceedings in respect thereof might be instituted under the Regulations.

Sub-paragraph (b) is relevant where:

- the operation is registered as an exempt waste operation (see also paragraph 2.11);
- the waste operation is permitted and the environmental permit includes conditions for the operator to comply with Article 4 of the Waste Framework Directive (2006/12/EC)¹⁰ (in respect of noise and odour nuisance, and in respect of the other emissions i.e. smoke, dust, steam, accumulation or deposit, or artificial light, in so far as they endanger human health or use processes or methods which could harm the environment) or which otherwise cover the relevant statutory nuisance (see also paragraph 2.12);
- the Part A(1) or Part A(2) installation or mobile plant is permitted and the permit includes conditions for the operator to comply with Article 3 of the Integrated Pollution Prevention and Control Directive (2008/1/EC)¹¹; (in respect of noise, odours, smoke, dust, steam, accumulation or deposit, or artificial light, in so far as they are harmful to human health or the quality of the environment) (see also paragraph 2.12);
- the Part B installation or mobile plant is permitted and the permit includes conditions for the operator to comply with Article 3 of the Integrated

⁹ If the nuisance is not listed in section 79(10) then the Secretary of State or Welsh Ministers' consent is not required.

¹⁰ <http://www.defra.gov.uk/environment/policy/permits>

¹¹ <http://www.defra.gov.uk/environment/policy/permits>

Pollution Prevention and Control Directive (2008/1/EC), as regards air emissions only (see also paragraph 2.12); or

- the mining waste operation is permitted and the permit includes conditions for the operator to comply with Article 4 of the Mining Waste Directive (2006/21/EC)¹² (in respect of noise and odour nuisance, and in respect of the other emissions i.e. smoke, dust, steam, accumulation or deposit, or artificial light, in so far as they endanger human health or use processes or methods which could harm the environment) or which otherwise cover the relevant statutory nuisance (see paragraph 2.13).

Notes on paragraph 2.10(b)

- 2.11 Exempt waste registrations do not have specific permit conditions attached however there is a general requirement under the Regulations that the method of disposal or recovery used is consistent with the need to attain the objectives of Article 4 of the Waste Framework Directive as reflected in the exemption requirements in Schedule 2, as set out for individual descriptions of exemption in Schedule 3.
- 2.12 Permits will normally have specific conditions relating to potential relevant statutory nuisances or in the case of Part A or Part B installations or mobile plant an implied general requirement. Where there is no such condition a local authority can institute proceedings without consent. Good communication between the Environment Agency and local authority is important as it will be expected that the Environment Agency respond to such a situation using its regulatory powers under the Regulations and ensuring that the matter is clearly subject to waste permit conditions.
- 2.13 Mining waste operations which existed on 1 May 2008 will be subject to transitional provisions detailed in the Regulations and may not yet be subject to an environmental permit. Again, where the Environment Agency cannot institute proceedings under the Regulations in respect of an incident which is also a relevant statutory nuisance, the local authority can institute proceedings without consent. Good communication between the Environment Agency and local authority is again important.
- 2.14 If an installation, mobile plant or waste operation is being operated without the necessary environmental permit or registration, the Environment Agency can take appropriate action for that failure. However, if they prosecute this will not constitute proceedings for the purpose of section 79(10) as any proceedings that are taken under the Regulations are in respect of the failure to hold the permit or registered exemption and are not in respect of the relevant statutory nuisance. Therefore, a local authority can institute summary proceedings for statutory nuisance without obtaining consent.

¹² <http://www.defra.gov.uk/environment/policy/permits>

2.15 However, in circumstances where the Environment Agency can take proceedings against an operator for not holding an environmental permit, where this becomes necessary because of a failure to meet the requirements for exempt waste operations resulting from a statutory nuisance (see paragraph 2.11), consent will be required.

3. Application procedure

Introduction

- 3.1 The EPA 1990 does not prescribe the form in which an application should be made to the Secretary of State or Welsh Ministers. These procedural guidelines have been prepared in order to ensure that there is a consistent approach to making an application, to assist the local authority in knowing how and what information to submit, to inform the Environment Agency of their role and to facilitate the application process.

Address

- 3.2 The application should be headed "Statutory nuisance consent application" and submitted, preferably electronically, to:

England

Email: helpline@defra.gsi.gov.uk

or by post to:

Secretary of State
Department for Environment, Food and Rural Affairs
Atmosphere and Local Environment
Nobel House
17 Smith Square
London SW1P 3JR

Wales

Email: wag-en@mailuk.custhelp.com

or by post to

Welsh Ministers
Welsh Assembly Government
Department for Environment, Sustainability and Housing
Cathays Park
Cardiff
CF10 3NQ

- 3.3 A copy of the application should be forwarded to the Environment Agency local area office. In addition, the operator should be advised that an application has been made to the Secretary of State or Welsh Ministers.

Information requirements

- 3.4 It is recommended that the following information should, where appropriate and where available, accompany an application in order to assist in dealing with the application more quickly:
1. Reason(s) for the local authority's application for consent;
 2. The name and address of the regulated facility or site of registered waste exemption against which the local authority wishes to institute proceedings;
 3. A statement that a statutory nuisance has been established;
 4. The type of statutory nuisance to which the application relates;
 5. A copy of the abatement notice in respect of the said statutory nuisance (if already served);
 6. Details of any relevant communications between the Environment Agency and the local authority in respect of the said statutory nuisance;
 7. Brief chronology of events including complaints, inspections and relevant correspondence with the complainant(s) and operator;
 8. Any other information that the local authority considers necessary to support the application; and
 9. A statement from the Environment Agency indicating whether they support or oppose the application, giving reasons.

Determination period

- 3.5 The Secretary of State or Welsh Ministers will aim to determine applications within 15 working days from receipt of the application. This determination period is dependent upon the completeness of the information submitted in support of the application, and a longer period may be required where additional information is needed.

Scope

- 3.6 Consent, where given, will be in respect of proceedings relating to a particular occurrence of statutory nuisance and should not be considered open-ended.

4. Indicative criteria for determining applications for consent

Introduction

- 4.1 The Secretary of State or Welsh Ministers will have regard to the following criteria when determining an application made under section 79(10) EPA 1990. However, all applications will be treated on a case-by-case basis.

Communication between the local authority and Environment Agency

- 4.2 Applications where no efforts have been made by the local authority to communicate with the Environment Agency as regards to the relevant statutory nuisance are unlikely to be considered favourably.
- 4.3 If the local authority holds information in relation to a statutory nuisance at a regulated facility or exempt waste operation that would inform the Environment Agency's regulatory functions, this information should be shared with the Environment Agency at the earliest opportunity. Likewise, the local authority would need to base its enforcement decision on the most up to date information and therefore good communication between the two organisations is strongly encouraged.

Regulated facility or exempt waste operation

- 4.4 Regulated facilities are subject to regular inspection and other compliance assessment by the Environment Agency, the frequency of which is based on risk posed by the operation and the level of compliance by the operator. It should therefore be expected that any circumstances likely to give rise to an incident that could also cause a statutory nuisance from permitted operations will be identified and subject to appropriate enforcement action by the Environment Agency.
- 4.5 Operators of most exempt waste operations are required to register with the Environment Agency although some must be registered with the local authority. Exemptions are used to regulate operations that are considered as posing a low risk. This will be reflected in the approach the regulator takes in making appropriate periodic inspections of these sites. It is possible that circumstances likely to give rise to a statutory nuisance may not come to the attention of the Environment Agency in the first instance, and complaints may instead be made to the local authority. Depending on the nature of the incident the local authority may be better placed to take enforcement action using its statutory nuisance powers.

Enforcement by the Environment Agency

- 4.6 Where the Environment Agency is instituting proceedings in relation to an incident which is also a relevant statutory nuisance i.e. odour, dust, noise, etc., the Secretary of State or Welsh Ministers are unlikely to give consent to the local authority under section 79(10).
- 4.7 It is not for the Secretary of State or Welsh Ministers to decide on who is taking the most appropriate enforcement action or to question the enforcement decision of either the Environment Agency or local authority but to prevent the operator from being subject to 'double jeopardy'.