

## Environmental Permitting Regulations (England and Wales) 2010

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**Regulatory guidance series No RGN 6**

# Determinations involving sites of high public interest

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<b>Version</b>	<b>Date</b>	<b>Change</b>
1.0	March 2008	Issued for launch of EPR
2.0	Sept 2008	Minor editing
3.0	Nov 2009	Draft for informal consultation. Extended to cover batteries, mining waste operations, water discharge, groundwater and radioactive substances activities
4.0	April 2010	Minor editing after considering submissions.
4.1	April 2011	Removal of reference to withdrawn operational instruction on reporting issues of high public interest

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Environment Agency  
Horizon House, Deanery Road  
Bristol BS1 5AH  
Tel: 0870 8506506  
Email: [enquiries@environment-agency.gov.uk](mailto:enquiries@environment-agency.gov.uk)  
[www.environment-agency.gov.uk](http://www.environment-agency.gov.uk)

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## SUMMARY

This is high-level guidance for our staff on what we see as sites of high public interest and how we handle applications for permits for such sites under the Regulations.

These sites generate a lot of interest for environmental, legal, political or other reasons.

They warrant specific guidance because we need to use the flexibility in the Regulations to focus on these determinations to satisfy public interest, and also because they can absorb large amounts of resources and have a higher risk of legal challenge.

Our staff are required to identify applications which may attract high public interest, so we can plan to involve local management and the necessary technical and legal advice.

We try to build an understanding in the community of the issues in these applications and have a flexible approach of using the most effective arrangements to help local people contribute to our decision-making. This is set out in our statement *Working together: your role in our environmental permitting*.

We will make our decision as robust as possible by involving the right people and following procedures carefully.

The guidance explains the principles and process for good decision-making, including appropriate consultation to get all the necessary facts and participation, so that our decision is fully informed, and interested people can contribute and then see the basis for the decision.

This guidance will change to reflect changes to relevant legislation and guidance, and experience of applying the Regulations.

# Contents

<b>1. Introduction</b>	<b>5</b>
<b>2. What is a ‘site of high public interest’?</b>	<b>6</b>
<b>3. Why do sites of high public interest require special treatment?</b>	<b>7</b>
<b>4. Good decision-making</b>	<b>8</b>
<b>5. A guide to good decision-making</b>	<b>10</b>
<b>6. Conclusion</b>	<b>15</b>

# 1. Introduction

- 1.1. This note provides guidance for our staff on determining applications involving sites of high public interest, for the purposes of the Environmental Permitting (England and Wales) Regulations 2010 ('the Regulations'). While written for our staff, we make it available to help customers too.
- 1.2. The Regulations provide us with greater discretion than some previous systems in how we make our permitting decisions, including on consultation. This allows our decisions to be more risk-based.
- 1.3. The Regulations therefore require us also to publish a statement of how we comply with our public participation duties. Our statement<sup>1</sup> describes when, how and with whom we consult on certain permitting matters.
- 1.4. This note focuses specifically on sites of high public interest and explains:
  - what we mean by 'sites of high public interest';
  - why we may need a particular approach to determining applications for such sites;
  - the basic principles which we should have in mind when we determine applications; and
  - what we should consider at each step we normally take to determine an application.

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<sup>1</sup> *Working together: your role in our environmental permitting*

## 2. What is a ‘site of high public interest’?

- 2.1 This note primarily applies to sites that are generating a lot of public interest (whether for environmental, legal or political reasons). The approach set out in it may also be applied to sites that have the potential to generate high public interest at some point. In such cases, the steps taken should reflect the likelihood that this potential will be realized, bearing in mind all the circumstances and the need to apply our resources appropriately.
- 2.2 Identifying these sites is only the beginning of the story. Our *Building trust with communities*<sup>2</sup> guidance sets out our approach to improving the way in which we involve communities. *Building trust with communities* explains clearly how we might approach these sites in terms of understanding community concerns and addressing those concerns through improving the way we provide information, consult and work with those communities.
- 2.3 This note concentrates on different issues, namely the fundamentals of good and defensible decision-making, focussing particularly on consultation.

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<sup>3</sup> *Working with others. Building trust with communities. A guide for staff*

### 3. Why do sites of high public interest require special treatment?

- 3.1 In a way, sites of high public interest do not require special treatment. We should apply the same principles of good decision-making to all our determinations.
- 3.2 However, under the Regulations we have discretion as to how we make our permitting decisions (see paragraphs 5, 6 and 8 of Part 1 of Schedule 5 to the Regulations). This allows us to use more of our resources on the more complex or challenging determinations at sites of high public interest and less on determinations which involve low or modest environmental risk, and are of limited public interest (the overwhelming majority of determinations). Our approach is to exercise our statutory discretion to consult more than usual on some (but not all) determinations involving sites of high public interest (see also RGN 8<sup>3</sup>).
- 3.3 This approach is a sensible use of our resources and is consistent with modern regulatory principles. But there are additional reasons for ensuring that sites of high public interest receive additional attention and financial, technical, legal and managerial support.
- 3.4 The main reason is that our decisions for these sites will be closely scrutinised and are more likely to be challenged. Whilst we are confident that our decisions are always **technically** sound, we need to ensure that other statutory bodies and the public have the opportunity to become involved in our decision-making, so that they can share our confidence.
- 3.5 It is therefore necessary that – where appropriate - we allow sufficient time to involve communities and other statutory bodies throughout the process, and to consider carefully all representations that are made to us. We are likely to receive requests for information, and we must allow interested parties a reasonable period, not only to obtain information, but also to make informed responses based on that information. We will almost inevitably have to extend the time period for making these determinations, and the officers responsible for them must receive support where needed.
- 3.6 We must also ensure that our decisions are **procedurally** correct. Good decision-making on complex environmental issues is rarely straightforward. But where sites of high public interest are concerned, it is as important that we get the procedural aspects right as it is that we are technically correct. However apparently obvious a ‘common sense’ solution may be, a procedural shortcoming in achieving it may provide grounds for a challenge. This note aims to provide guidance on ensuring that the correct procedures are followed.

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<sup>3</sup> Regulatory Guidance Series, No EPR 8 *Changes to operation*

## 4. Good decision-making

4.1 There are two basic aspects of decision-making which we must understand:

### *Basis for a good decision*

- We have taken it in good faith and without any bias or improper motive.
- We take it: in other words, it is wholly our decision, and we do not limit our discretion or hand it to someone else. Even where we receive expert advice from external bodies, we consider that information critically and make up our own mind.
- We take the decision based on all the relevant information and criteria. If that means we have good reason to slow down the determination while we make further enquiries or arrange for more investigations to be carried out, then so be it.
- We take the decision based only on relevant information. However important an issue may be to particular groups or individuals, if it is not a legally-relevant basis for our decision, we must not take it into consideration.
- Where we have discretion, we must consider how to exercise it, no matter how apparently obvious the answer, and we must exercise the discretion in a reasonable manner.

### *Procedure*

- We must make our decision in a way that complies with all relevant law and current guidance, and we must be able to show that we have considered everything that is relevant and followed all relevant procedural steps.
- We must consider the legitimate expectations of organisations, groups and individuals interested in the determination. In other words, even if law and guidance do not require us to do something, if we have said we will do something or the situation dictates, we should go the extra mile. (That does **not**, however, mean that we have to accede to every demand that is made upon us.)
- For sites where we consider the public interest to be particularly high, we may consult to a greater extent than usual. How far we might go is addressed below, but it is crucial to involve the public and external bodies where appropriate, and in line with our Working Together Agreements<sup>4</sup>.
- The way we consult must be **genuine**. In other words, we must provide full information to consultees, in a way which they can access and which helps them understand it. We should help consultees understand which issues are relevant to our decision-making and which are not, to assist them in concentrating on the points that could affect the result. We must then give them a reasonable time to consider that information and respond, bearing in mind their resources. If new information is received while we are making a determination, we must make it available to the consultees,

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<sup>4</sup> See paragraph 5.3 of our public participation statement



again in a way that ensures they have the information at the right time and in a useable format. If necessary, we should seek an extension of the timescale for the determination, as this may be essential in getting the decision right and being able to defend it.

- We must take all relevant information into account in our decision-making.
- We consult on the following applications:
  - new bespoke permits
  - new standard permits for Integrated Pollution Prevention and Control (IPPC) Directive installations
  - variations to permits for IPPC Directive installations which would make a 'substantial change'
  - variations to permits for mining waste facilities which would make a 'substantial change'.
- We also consult on applications for variations to bespoke permits where we consider that the level of public interest, and the significance of the change, make it appropriate.
- Where a site of high public interest is involved, we also normally carry out a 'minded-to' consultation. That means we will present a draft permit or variation (as the case may be), accompanied by an explanatory document. This means everyone can see and understand our thinking, and have a further opportunity to comment if they think we have made any serious mistakes. (If we initiate a variation ourselves and consultation is required under paragraph 8 of Part 1 of Schedule 5 to the Regulations, that consultation will be on our draft variation, and so is effectively a minded-to consultation in any case.)
- We will also do this for variations to existing permits which allow the operator for the first time to carry on an activity listed in Part 2 of Schedule 1 to the Regulations, even where the change involved is not 'substantial'. This is because the variation is in law a new permit for an IPPC Directive installation, and we wish all new IPPC Directive permits to be treated equally.
- We will publicise our final decision and explain and justify it in a decision document covering the legal and procedural matters.

4.2 If officers are ever in doubt about these issues, you should get advice from our lawyers, who will work with you to clarify the process and to resolve difficulties as quickly as possible. The earlier in the process you get legal advice, the easier it will be to avoid procedural defects, which may be difficult to remedy retrospectively. For sites of high public interest, our lawyers will provide you with support throughout the decision-making process.

## 5. A guide to good decision-making

- 5.1 The following table works through the key phases of determining an application for a new permit for a site of high public interest. It distinguishes between what **must** be done and what **may** be done. In the latter case, it sets out options that officers may find useful to consider. There are few hard-and-fast rules, and officers will need to bear in mind the underlying principles set out in section 4 above. Again, if you are in any doubt, consult a lawyer.
- 5.2 The same principles can be applied (as appropriate) to determinations involving variations.

<i>Stage/phase</i>	<i>Comment</i>
Identification of site of high public interest	When a site of high public interest is identified, an initial 'screening', involving all colleagues with relevant knowledge, is highly advisable. This will enable us not only to gauge the appropriate way to approach a particular determination, but also how the site may relate to other similar sites elsewhere in the country, where relevant experience has already been gained. (In the case of a potential site of high public interest, this screening may establish in fact that it can be managed as a more standard determination).
Pre-application consultation by operator	Pre-application consultation by the operator of relevant public bodies or the public is likely to be beneficial (although responsible operators of sites of high public interest will aim to build an ongoing relationship with their local communities in any case). In particularly sensitive situations, it would be appropriate to encourage the operator to do so. The main motivation for a specific pre-application consultation is to identify and gain a better understanding of the most important issues for people, which will not always be the most obvious ones. Therefore, the more clearly the operator can provide information to the public at this stage, the better the operator's understanding will be. This will help to ensure that the operator can deal with the important issues and make well informed strategic choices. The earlier the operator makes any changes in its approach, the easier it will be to communicate this and to foster confidence. Pre-application consultation can inform all subsequent stages (but particularly the application) and can help immensely in determining the application.
Application	As indicated above, responsible operators should be aware of any public concerns about their activities, but where the operator has conducted a pre-application consultation, the application can reflect these concerns and seek to address them. Where the operator has succeeded in addressing the main concerns, our job in determining the application will be made much easier.

The operator should think about the format in which it makes the

application. Wherever possible, the operator should provide electronic versions, as this will help provide access to the information, for instance by placing it on websites and publishing on CD-ROM. Where the operator is applying for an activity at the same time as operators in other parts of the country, or is a large company making similar applications elsewhere, providing electronic copies makes it easier for the interested public to collate the information and gain an overview. For local communities, access to electronic copies reduces the need to visit the public register and make their own paper copy (possibly on more than one occasion), the expense and inconvenience of which can hinder public participation.

Consultation on the application: public bodies

We decide the extent to which we will consult with other public bodies. As we have set out in our public participation statement (PPS<sup>1</sup>), we have published working together agreements which describe how we will consult public bodies.

If a public body has an interest or expertise which is particularly relevant to the determination, we must make all reasonable efforts to obtain its views, and if necessary we will work with that body for as long as it takes to do so (within reason). When we receive the views of the public body, we must however, critically evaluate the information and the evidence on which it is based, and make our own decision: our decision-making function must be evidence-based.

Consultation on the application: the public

Our PPS confirms that we will always advertise applications on our website. Note that it is crucial that the advertisements comply with all the relevant requirements.

But our advertisements may not always come to the attention of everyone who might wish to be involved over a site of high public interest. We may wish to consider a variety of additional forms of advertisement. These may include advertisements in local newspapers, press releases, leaflet drops, or posters in local shops and libraries.

We may wish to consider enhanced publicity. Once again, having electronic copies of the application will help this. However, we must ensure our public register information is complete throughout the determination, and we must take care that we do not lead anyone to believe that the original application itself will necessarily be the only information on which we base our decision, as other information may be received during the determination process (e.g. in response to our own information requests) which may affect our determination.

We should also consider issuing our own summary of the application, together with a summary of the factors on which our decision will be based and how we will consult. In some cases, this approach has proved extremely useful in explaining technical issues in a more accessible way, and in identifying the relevant issues. This can improve public understanding, and the quality and speed of our decision-making. Where a minded-to consultation will be carried out, it can also alert the public to the fact that they will have two opportunities to make their views known.

Consultation:  
additional  
consultation  
during the  
determination  
period

The measures we take and the timescales applied must reflect the circumstances. *Building trust with communities* provides essential guidance on engaging with the public while we are determining an application.

We should remember that where we are determining an application for the - relatively few - sites of high public interest, time and resource invested at this stage may pay big dividends. Standard timescales should obviously be considered, but we must extend them where appropriate, and particularly where consultation issues are involved. All relevant support **must** be provided to officers determining these applications, and a project team approach, involving technical, legal and communications expertise (involving Head Office as appropriate), has been shown to work extremely well. Screening an application early on will help to ensure that appropriate support is provided to officers.

One very important question is how we deal with information that we receive after the initial application, but before we make our decision (for example, responses to our own requests for further information from the applicant). We must place all the necessary information on the public register, but – as with the original application - that is not necessarily the best way of bringing it to everyone's attention.

We need to decide whether this information could affect the representations people may wish to make. If so, then whether or not we think it is likely that the representations will ultimately affect our decision, we must inform people of the new information and then give them an adequate opportunity to comment. (Where any additional information is just to provide clarification, or is minimal, and we are confident that it would not have affected anyone's representations, then we may decide not to take any additional steps: but care must be taken in making this decision and you should get advice where necessary).

It is possible, as information is produced or is received at different stages as we are determining a complex application, that our consultation may become difficult to manage or confusing.

One good way of dealing with this is to consult on a draft decision. This is particularly suitable for sites where public interest is particularly high, where the issues, the content of the permit, and our reasoning are likely to be of greater interest to the public.

Where we have received or obtained significant additional information whilst determining the application, we should make sure that we identify it and make it available as part of the consultation on the draft decision. That could mean (for example) appending a report where that makes reference easier and it is practicable to do so.

It is crucial to make clear to consultees that, as we consult on our draft decision, we have **not made up our mind**. Although we have reached preliminary conclusions, we are putting these into the public domain with a view to obtaining further informed

comment, which will inform, and could alter, our final decision. The draft decision will be accompanied by a full explanatory document which should have been prepared in consultation with lawyers.

One main aim of this kind of consultation is for us to explain all the information and representations we have received, and how we have considered them. Where we have received additional information, and many responses to the initial consultation on the application, consulting on our draft decision is an excellent way for us to provide people with a clear understanding of our preliminary view, and an opportunity to comment further before we make our final decision.

Although this may appear to add considerably to the time and effort we must expend in determining an application, it is largely work that we have to do in any event where the public is particularly interested in the application. If we have consulted adequately on the application, it is less likely that significant new issues will be raised when we consult on our draft decision. This means that we can finalise our decision, and its accompanying decision document, quickly, and the last consultation exercise will give us additional confidence in our decision.

We must nonetheless consider any significant issues that emerge from this second stage of consultation. Dealing with these issues before we finalise our decision will enable us to reach the right conclusions.

Publication of our decision

In a case of high public interest, we will publicise our decision on our website to ensure that the public remains informed and involved.

In cases of high public interest we should provide a full explanation of our decision, and the decision document may be complex and lengthy.

However, where our consultation has followed the above guidelines, we will have all the relevant information, and if we have consulted on our draft decision, the decision document will already have been largely written (although of course it will need to reflect the final round of consultation and remains open to being changed to reflect any issues that arise at that stage).



## 6. Conclusion

- 6.1 This note is merely an outline of the principles of good decision-making and how we should apply them to sites of high public interest. There should be relatively few such sites, so this guidance will not be fully applicable to all our decision-making. When determining applications involving sites of high public interest our decisions are more likely to be challenged, and our experience shows that taking the time and trouble to follow the guidance in section 5 above, and maintaining good records of how we have made our decision at every stage, makes our decision-making significantly more robust.