

THE INTERFACE BETWEEN PLANNING AND POLLUTION REGIME CONTROL. UNDERSTANDING THE EA'S POSITION ON THEIR INTERACTION WITHIN ACOUSTICS

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1 INTRODUCTION

The National Planning Policy Framework¹ (NPPF) sets out the Government's position on planning policy for England, guiding Local Planning Authorities' decision-making processes over the suitability of land use. The Environment Agency (EA) under the NPPF is considered a pollution control authority, whose responsibility it is to ensure permitted facilities can prevent or minimise pollution from operations through the application of the Environmental Permitting (England and Wales) Regulations 2016² (EPR).

Planning and Pollution control regimes typically sit hand in hand, but since the revision of NPPF in 2018 to include the 'agent of change' principle, conflict has arisen between new residential developments and permitted industry. The 'agent of change' principle now means the use of land for residential purposes next to permitted industries can now be considered a suitable use by Local Planning Authorities. This can cause permitted facilities (regulated by the EA) to be unable to work to the conditions set out within their environmental permit, as such unable to comply with EPR, which could lead to the EA being required to take enforcement action, and businesses ceasing operations.

This difference in processes between Local Planning Authorities and the EA has led to a misunderstanding of the requirements of the EA's permitting process, which can lead to delays in the environmental permit application process or even to the refusal of applications.

This paper sets out the EA's position on the interface between the planning and permitting regimes and how it can affect permitted facilities. This paper aims to help improve acousticians' understanding of the permitting process, how to assess the impact of noise from a permitted facility to support an environmental permit application and what the EA requires of applicants in relation to proposed residential receptors adjacent to EA-regulated facilities.

2 ENVIRONMENTAL PERMITTING

The Environment Agency has regulated noise emissions from major industry since the early 2000s. Regulation of noise emissions was further strengthened in 2016 under the Environmental Permitting (England and Wales) Regulations 2016. Under EPR, the EA has legal powers to prevent serious pollution incidents with EPR placing the onus of responsibility on operators to ensure their regulated activities do not cause pollution to the environment or cause harm to human health. The environmental permitting framework determines if an operation can be managed on an ongoing basis to prevent or minimise pollution. The permitting framework differs from planning by ensuring compliance is an ongoing concern, with the environmental permit itself being a live document that is updated regularly. The EA is also required to review permits on a regular basis to ensure permit conditions are being met and continue to reflect appropriate standards, so remaining adequate in light of new experience and knowledge. The EA can request changes to an environmental permit at any

time once a permit has been issued - an example of this would be where the location of human receptors changes, or a change in sensitivity of non-human ecological receptors.

The EA's guidance for noise impact assessments (NIAs) requires noise emissions from regulated industrial processes to be assessed in terms of BS 4142:2014+A1:2019³, in relation to the existing background sound climate, in the absence of sound from the site being assessed. The use of noise limits or assessment methodologies from guidance such as BS 8233:2014⁴ or BS 5228-1:2009+A1:2014⁵ are not considered acceptable for the assessment of the impact of noise from EA-regulated facilities.

As part of the EA's permitting process, a standard condition is applied in relation to noise:

"Emissions from activities shall be free from noise and vibration at levels likely to cause pollution outside the site, as perceived by an authorised officer of the Environment Agency, unless the operator has used appropriate measures, including but not limited to, those specified in any approved noise and vibration management plan, to prevent or where that is not practicable, to minimise, the noise and vibration."

The requirements to "prevent" or "minimise" noise and vibration ensures the EA's regulation process for permitted facilities is consistent with the aims of the Noise Policy Statement for England, 2010⁶ (NPSE) i.e.,

- avoid significant adverse impacts on health and quality of life;
- mitigate and minimise adverse impacts on health and quality of life; and
- where possible, contribute to the improvement of health and quality of life.

The use of noise limits for the regulation of EA-regulated facilities would therefore not be in accordance with the aims of the NPSE.

3 DUAL REGULATION: THE RELATIONSHIP BETWEEN PERMITTING AND PLANNING

Understanding the relationship between the permitting and planning regimes, and how this may affect operators is important when assessing the impact of noise emissions from permitted facilities. The National Planning Policy Framework, 2021 sets out the relationship between the planning and permitting processes within paragraph 188, stating:

"The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

In relation to the NPPF, the EA is considered to be the 'separate pollution control regime', and Local Planning Authorities (LPAs) should assume the permitting regime 'will operate effectively'.

The EA is unlikely to outright refuse an environmental permit for a proposed facility based on location (for example in an area with residential use in close proximity), unless there is a significant environmental impact which cannot be mitigated against.

Scenarios often occur where a proposed facility or site requires planning permission, *and* an environmental permit to operate specific plant or installations. The LPA may ask an applicant for information to help them decide if the application represents an appropriate use of land, and they may also impose limits on certain aspects (such as noise) in the planning permission to ensure this is the

case. Environmental permit applications are often submitted after the planning application (even though there is no requirement for an environmental permit application to be made after the planning process). As such, applicants often perceive 'dual regulation' is occurring and question why the EA are asking for another NIA with (often) different requirements, when they have already submitted their planning application, and potentially had their planning application decided by the LPA. As the EA is required to control noise emissions for permitted activities via the relevant schedules and paragraphs in EPR, the EA is responsible for controlling noise emissions from the installation in these specific circumstances. In accordance with NPPF, it is outside of an LPA's remit to set noise limits for facilities to control noise pollution, where the facility will (subsequently) be regulated by the EA under an environmental permit, yet this regularly occurs.

An example of when dual regulation occurs is when planning permission contains limitations on the throughput of a waste site for highways reasons (to control the amount of traffic on local roads). This would not prevent the EA from issuing standard rules permit for a higher throughput as it is considered appropriate in environmental terms. However, the operator would need to comply with both its planning and permitting requirements, this would mean in this case it would need to comply with the lower limit set by the council.

Another example would be a planning condition limiting the height of an acoustic barrier for visual amenity, but for environmental reasons a higher acoustic barrier is required to control noise pollution. Two different requirements have been put in place by the LPA and the EA, which appear to be setting out contradictory actions. The EA would justify its' requirements in terms of regulatory concerns. In these circumstances it would be for the applicant to reconcile the different concerns which could include alternative forms of mitigation so that a lower barrier height would be acceptable.

4 IMPLICATIONS OF NEW RESIDENTIAL DEVELOPMENTS ON EA-REGULATE FACILITIES

Since 1998 the Government has put significant importance on the redevelopment of brownfield sites with additional powers given to LPAs to fast track the planning process. The White Paper: Planning for the Future (2020)⁷ sets out the UK government's plans to maximise the use of brownfield sites to protect the countryside and preserve biodiversity. However, these plans can bring new residential developments into conflict with existing industrial facilities, many of which are regulated by the EA. For example, where a permitted facility exists and a proposed residential development would result in properties closer to the permitted facility than existing properties, the operator will still be required to comply with the conditions of their environmental permit under EPR, i.e., prevent significant adverse impacts and minimise adverse impacts. The EA, in accordance with its powers as a regulator, cannot allow the operator to be in breach of EPR and may have to take enforcement action against operators who do not take preventative action.

By granting planning permission for residential developments adjacent to existing industrial facilities which are regulated by the EA, the LPA's planning decisions can place onerous requirements on operators of permitted facilities to comply with EPR, which can have implications on their ability to operate.

The EA and AQMAU typically encounter this issue when:

- An applicant applies for a bespoke environmental permit, but has not included a proposed residential development in their BS 4142 assessment;
- An operator of a permitted facility applies for a variation to their existing environmental permit. Examples of common variations include an increase in throughput, change to operational hours, addition of new waste code(s), or change to a permit boundary;
- An operator of a permitted facility updates their noise management plan (NMP) - as is required every 12 months and identifies new residential receptors associated with a planning application; or

- An operator of a permitted facility does not acknowledge new residential receptors, and the EA receives noise complaints from the occupants of the new development.

4.1 Why is this happening? (NPPF Paragraph 187: 'Agent of Change')

In July of 2018 the NPPF was revised to include the 'agent of change' principle, which gave LPAs the ability to be more flexible with their decision of the suitability of use of land. The 'agent of change' principle was designed to protect existing business and industry when new residential developments are proposed to be built in close proximity and likely to affect their ability to operate, by placing the responsibility on the new development (the 'agent of change') to mitigate against existing sound sources where this would affect the new development. LPAs have used the 'agent of change' principle successfully to protect live music venues from closure when new residential developments have been constructed in close proximity to them, where previously it may have led to their closure. However, this same protection does not apply to permitted industry, where pollution control is regulated by the EA and the control of emissions is the operator's responsibility under EPR.

The EA has recently seen an increase in environmental permit applications and variations to existing environmental permits where applicants and acoustic consultants have proposed the 'agent of change' principle as justification for significant adverse or adverse BS 4142 impacts being 'acceptable', when considering the context associated with the predicted impacts.

With the release of the Government's white paper on the development of brownfields sites, there is greater emphasis on developing these sites, which has increasingly led to new residential developments being located in areas which include industrial uses, and consequently in closer proximity to EA permitted sites than had previously been seen. What the EA is experiencing now is that as permitted sites apply to vary their environmental permits the argument of 'agent of change' is proposed to account for impacts which would be unacceptable in terms of EA guidance, EPR and the aims of the NPSE. Fundamentally, the message the EA receives from applicants and consultants is that 'industry was there first'. This argument comes from paragraph 187 of the NPPF which states:

"Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed."

The 'agent of change' principle as set out within paragraph 187 of the NPPF states how planning policies and decisions should integrate effectively with existing business and community facilities. It is designed to allow development within contentious areas where pollution could be considered an issue. This principle is designed for and only applies to the decisions made by LPAs in their decision of the suitability of land use, not pollution control authorities' ability to regulate permitted industry.

Mitigation schemes for residential developments typically rely on controlling internal and external noise levels to the requirements of BS 8233 using glazing schemes, façade constructions and localized acoustic barriers, which are outside of the permitted facilities control. Crucially, provision of mitigation measures at the residential development to achieve LPA requirements will not control the operational sound emissions from the permitted facility ensuring that the operator can comply with conditions of their environmental permit under EPR. The argument that the operator was there first does not negate the fact that they could be causing unacceptable noise pollution at the new development, as a result of planning decisions.

5 WHAT THE EA REQUIRES FROM APPLICANTS

The EA requires the applicant or operator of an existing facility to consider proposed residential properties as noise sensitive receptors within submitted NIAs, for new bespoke applications or variations to existing environmental permits. The EA's guidance document 'Noise and vibration management: environmental permits'⁸ states: "If your facility has not caused noise problems in the past but your circumstances have changed, (for example, if a new residential development is built closer to the site boundary) you may have to take action to prevent (or where that is not practicable, minimise) actual or potential noise pollution". The requirement to consider future receptors is also set out in BS 4142 4(e), 8.1.1(e) and 8.5.

This applies to any proposed residential development with an outline or full planning application submitted in the planning system, and for developments which have obtained outline or full planning permission. Where adverse or significant adverse impacts are predicted at the proposed development, the EA requires the consideration of mitigation in the BS 4142 assessment. The EA appreciates that as proposed residential developments may be at different stages in the planning system, there is no guarantee that a planning application for a proposed development will be approved by an LPA. However, the EA requires the applicant or operator to demonstrate that they are aware of the potential for new receptors existing close to their permitted facility and have strategies in place for reducing BS 4142 noise impacts should these new receptors be constructed. The following basic approach is taken by the EA when dealing with these scenarios:

- Outline or full planning application, Awaiting Decision or Pending Decision by LPA: provide indicative mitigation assessment in BS 4142 assessment;
- Full planning application, approved by LPA: provide detailed mitigation in BS 4142 assessment.

The timescales for implementing new mitigation measures can be managed through permit conditions, where appropriate.

6 HOW THE EA ENGAGES WITH PLANNING

The EA is a statutory consultee of the planning system and engages with LPAs in relation to planning applications through the Sustainable Places team. Through this interface, the EA can highlight the potential implications a proposed residential development may have on the operator of a permitted facility through standardised responses. The EA does not have sufficient resources to comment on every individual planning application, and such developments do not automatically trigger a review of an existing environmental permit. The onus is on the operator to be aware of any potential new receptors which may affect their ability to comply with their environmental permit and plan accordingly. The standardised responses highlight the risk of proposed residential developments on the ability of operators of permitted facilities to comply with the conditions of their environmental permit and EPR.

7 RECOMMENDATIONS FOR APPLICANTS AND ACOUSTIC CONSULTANTS

We offer the following practical advice for applicants and acoustic consultants to deal with this issue effectively.

- When instructed by an applicant / operator of a permitted facility, ask them whether they have requested pre-application advice (basic or enhanced) from the EA. Pre-application advice will provide you with links to the appropriate guidance for preparing a noise impact assessment in support of an environmental permit application;

- When instructed by an applicant / operator of a permitted facility, ask them whether they are aware of any proposed residential developments adjacent to their existing / proposed facility;
- Encourage the applicant / operator to engage with the planning application so they can understand the potential implications on their ability to comply with EPR;
- Be aware that the EA will require a background sound survey, BS 4142 impact assessment and consideration of indicative or detailed mitigation measures (where required to prevent significant adverse or reduce adverse impacts) depending on the status of a planning application for a proposed residential development;
- The 'agent of change' principle is not considered by the EA to be a valid justification for a significant adverse BS 4142 impact being considered 'acceptable' when considering context;
- The EA is here to assist applicants and acoustic consultants on this issue. When we ask for additional information through a Schedule 5 notice, we are exercising our legal powers in accordance with EPR, to protect people from noise pollution, in accordance with our duties as a regulator;
- This is an emerging issue which is becoming more common place – as consultants you should be aware of this issue in case it happens to one of your sites, so you are aware of what the EA requires.

8 CONCLUSIONS

The EA works to prevent and minimise noise pollution from permitted industry through regulation, this is achieved through effective permitting of industry in line with EPR as set out in UK government legislation. Although this regulation is sometimes construed negatively as 'dual regulation', the role of the EA to control pollution exists in parallel with that of LPAs, whose role is to make decisions on the suitability of the use of land, not control noise emissions from a permitted facility.

With the drive to develop brownfield sites for new residential developments, EA permitted facilities are coming into conflict with residential developments and as such facilities need to be aware of the impact this is likely to have on their operations. If noise pollution from operations is likely to affect new residential developments applicants / operators may have to take action to prevent (or where not practicable, minimise) noise pollution.

When new residential developments are being proposed near to permitted facilities, we recommend acousticians work with their clients to understand the possible impact the development is likely to have on operations at the permitted facility. Site operators should engage with their local planning authorities at the earliest opportunity if they have any concerns that a new development may affect future operations at the facility. Although the EA can be approached as a statutory consultee on new developments, we will only provide a standardised response and the consultation will not trigger a review of an existing permit.

9 REFERENCES

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