

Environmental Permitting Regulations (England and Wales) 2010

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Regulatory Guidance Series, No RGN 3

Deciding applications are duly made and requests for further information

Record of changes

Version	Date	Change
1.0	March 2008	Issued for launch of EPR
Draft	Nov 2009	Draft for informal consultation incorporating changes for water discharge, groundwater & radioactive substances activities. No changes necessary for batteries and mining waste operations.
2.0	April 2010	Minor editing after considering submissions. Clarification on timescale for duly made, multiple operators and provision of information twice (Regulators Compliance Code).

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SUMMARY

This is our high level guidance on deciding if an application for a permit is duly made (i.e. seems adequate for us to begin to determine) and whether to seek more information when examining it in detail.

We assess whether an application is duly made by checking if the application should be coming to us, the correct fee has been paid and if the essential administrative and technical information appears to be provided. We try to help the applicant fix minor discrepancies, but we have to reject applications that require significant rework before they are capable of being determined.

If we find gaps in essential information when examining the application in detail, then we can serve a notice requiring further information. If that is not supplied, we might then have to consider the application withdrawn. The applicant could appeal if they wish.

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1. Introduction

1.1 This guidance covers:

- what is required to make an application 'duly made' for the purposes of the Environmental Permitting (England and Wales) Regulations 2010 ('the Regulations');
- what further information we can require after an application has been duly made.

1.2 The guidance is aimed at applications for new permits, but is also relevant to applications for variations, transfers, and surrenders.

1.3 It is written for our staff but we make it available to help customers too.

2. Duly made

What does duly made mean?

- 2.1 An application is duly made if it contains the required components and sufficient information for it to begin to be determined. Until an application is duly made we cannot consult on it, decide confidentiality claims, or determine it.
- 2.2 Paragraph 12(1) of Schedule 5 to the Regulations says that the regulator must grant or refuse a duly made application. So an application must be capable of being determined - whether granted or refused - in order to be duly made. Defra and WAG's *Environmental Permitting Core Guidance* ('the Core Guidance') confirms this by saying that applications should give all the information the regulator needs to make a determination.
- 2.3 An insufficient justification of a claim for commercial confidentiality (or where we have not decided if something is commercially confidential) does not stop the application being duly made. Similarly, an insufficient or undecided claim for national security¹ does not stop the application being duly made.

What does duly made not mean?

- 2.4 Assessing whether an application is duly made is **not** a detailed technical evaluation. We should not make a judgement about the merits of the operator's proposals at this stage. For example, it may be clear from an application that a permit is unlikely to be granted because the environmental effects would be unacceptable. This would not stop the application being duly made. The fact that the environmental impacts would be unacceptable should result in us refusing the application (or imposing conditions to mitigate the environmental impact) rather than us considering that the application is not complete.

Administrative check of duly made

- 2.5 We should not consider an application duly made where:
- the correct application form has not been used;
 - we do not regulate the activity;
 - any fee needed has not been received in accordance with the relevant charging scheme;
 - the basic details (name, address and so on) of the regulated facility or operator have not been provided or are manifestly wrong, to such an

¹ Note that matters of national security are considered by others, not us.

extent that they could be very misleading;

- the operator is not a legal entity;
- information listed in the application checklist has not been provided;
- the declaration in the application form has not been completed.

Technical check of duly made

2.6 We should spend up to 3 hours (1/2 hour for a standard permit application) on a basic technical assessment to decide if there is sufficient information for us to determine the application. If it is clear after this basic technical assessment that we need significant additional information to determine the application, we should consider the application not duly made.

2.7 Here are some technical examples of when we may decide an application is not duly made:

- the regulated facility has not been properly identified or described;
- there is substantial and obvious doubt over the basic adequacy of a key part of the application, for example the environmental risk assessment;
- the non-technical summary is misleading;
- the fee is insufficient;
- requirements of a relevant directive have not been addressed, for example the Waste Incineration Directive where applicable;
- in cases where there is more than one operator of a facility (eg a shared sewage treatment plant), a single application must be submitted jointly.
- where there are separate operators for different parts of what would otherwise be one facility (say a chemical plant operate by a chemicals company and its boiler plant operated by an energy company), then each operator must submit its application for its regulated facility before they can all be considered to be duly made (see section 5.5 of the Core Guidance).

Regulators Compliance Code²

2.8 Under the code, we should not ask for unnecessary information or the same information twice. We can use information already supplied for other purposes but will need to ensure it comes in as part of the application package such that it can go to consultees and public registers as a readily understandable package. Use of electronic media and good referencing may make that feasible.

How long it should take

2.9 We will make the duly made decision as quickly as possible, within 10-20 working days, according to the complexity of the application. The customer should be told when the decision has been taken.

The decision on duly made

2.10 We should always seek to act reasonably and our refusal to consider an application duly made must be justifiable. We should always be able to give clear reasons where we reject an application as not duly made. However, this does not mean we should provide detailed help to the operator to rewrite the application.

2.11 There is no right of appeal against a decision that an application is not duly made. Normally, this should not be a problem because we will return the fee with the application and the operator can re-apply. However, in cases where we disagree about a fundamental matter (rather than, say, crucial information being missing), it may be more appropriate for us to accept the application as duly made and then refuse the application. Both parties then have the opportunity to have it resolved through an appeal. An example of this situation may be where we cannot agree on the extent of an installation. If in doubt, seek legal advice.

Resolving a problem with the application

2.12 Before we communicate our decision that the application is not duly made, we must then decide whether the applicant can easily resolve the problem.

2.13 Where there is an easily rectifiable omission, we should allow the applicant to submit the missing information, so that the application will be duly made. Examples of this situation would be where:

- a plan or document is listed in the checklist but is not included with the application;
- the fee is not attached; or
- the application form declaration has not been completed.

² *REGULATORS' COMPLIANCE CODE*, Statutory Code of Practice for Regulators, Better Regulation Executive, 17 DECEMBER 2007.

- 2.14 Where our assessment has identified inadequacies in the application, we should decide whether all the necessary information could reasonably be supplied by the applicant and provided to us within 10 working days.
- 2.15 Where we decide that the applicant could resolve the problem, we should write to them specifying the information required, explaining they have one opportunity and 10 working days to provide it. An e-mail can be used for this, provided it is sent to the appropriate contact. A telephone request can help to explain matters but it must be confirmed in writing.
- 2.16 If the applicant fails to supply the information within the deadline we should return the application as not duly made along with any fee that has been paid.

3. Information notices

What the Regulations say

3.1 The Regulations state (paragraph 4(1) of Part 1 of Schedule 5):

‘If the regulator considers that it requires further information to determine a duly-made application, it may serve a notice on the applicant specifying the further information and the period within which it must be provided.’

When should we serve an information notice?

3.2 Information notices are not a way of repairing an application that should not be duly made in the first place. They should be used only **after** an application has been duly made.

3.3 We should only serve an information notice where the information is essential to determine the application (see section 6.18 of the Core Guidance).

3.4 We aim to serve only one information notice, requiring all the information we consider necessary to determine the application. However, more than one notice may be necessary if, for example, dealing with a complex issue, or where more information is needed as a result of a consultation response.

3.5 We should always serve an information notice in order to seek significant information, rather than doing it informally. This has several advantages. The clock stops running on the determination period until we have received all the information required by the notice. It is more transparent for the public - information notices and responses are public register information. If the applicant does not respond in time, we can deem the application to be withdrawn and tell them so.

3.6 By way of example, we may serve an information notice to get the following essential information:

- some aspect of the initial state of the site of an installation or waste operation;
- some information we need to complete an assessment of the environmental risks;
- performance or cost information we need to choose between options in deciding the most appropriate techniques.

What information can be obtained after the permit is granted?

- 3.7 We can get information which would not materially affect the outcome of the permit determination through pre-operational conditions or improvement programme conditions in the permit. However, we must not allow the determination of significant issues to be deferred until after the permit has been granted, as this would deprive the public of important consultation information.
- 3.8 For example, if the operator proposes in an application to include emission monitoring points, but there is a good reason why they cannot provide full details at this stage, they should state the construction standard, justify that standard and provide approximate positions, etc. Pre-operational conditions should require: the monitoring points to be compliant with the standard, provision of the final layout and sample point design, secure our agreement that the standard is met, and our approval for the layout is obtained prior to commissioning. If the operator proposes something less in the application, a notice should be used to gain further information.

What should be in an information notice?

- 3.9 Our information notices should:
- be as clear, concise and precise as possible
 - ask closed questions wherever possible
 - be clear why we need the information
 - refer to the relevant part of the application form
 - specify a reasonable deadline for receiving the information
- 3.10 We must specify a reasonable deadline for receiving the information that takes into account the size of the task in collecting/generating and formatting the information. It is good practice to discuss with the applicant the deadline for a complex notice before we issue it. It should be made clear to the applicant that the clock ceases to run while we wait for the information, so it is in the applicant's own interest to supply the information as quickly as possible.

What happens if we don't get the information requested?

- 3.11 If the information requested is not supplied, the determining officer should get management help to review what is reasonable and take legal advice on whether to deem the application to be withdrawn (see section 6.22 of the Core Guidance).
- 3.12 There is a right of appeal against deemed withdrawal for lack of information. It would only consider the disputed issue, i.e. the sufficiency of the information.
- 3.13 Alternatively, we can refuse the application if we consider that it is inadequate as a result of the failure to supply the information. Again, legal advice should be obtained.
- 3.14 We should normally offer the applicant the opportunity to discuss the situation before we serve a notice saying that the application is deemed to be withdrawn (see section 6.23 of the Core guidance).