

Environmental Permitting Regulations (England and Wales) 2010

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Regulatory Guidance Series, No RGN 7

Appeals to the Secretary of State or Welsh Ministers

Record of changes

Version	Date	Change
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SUMMARY

This is general advice to our staff on how to deal with appeals to the Secretary of State or Welsh Ministers on our decisions. Usually, appeals are passed to the Planning Inspectorate – England – Wales (PINS) for resolution. We must follow their guidance.

We should consider appeals risk when making our decisions, take early advice from Legal Services where that risk appears significant, and consult the operator accordingly where possible. Similarly, we should try to informally resolve those that do arise - where this is appropriate.

Normally, the original case officer will lead in dealing with an arising appeal, with support from Legal Services and other national experts. They must develop a strategy and timely plan trying to resolve it informally if possible, seeking extra time from PINS if justified and being ready to put our case if necessary. A national appeals co-ordinator will help to ensure we meet PINS deadlines.

Advice is given on how to prepare for, and present at, a hearing or inquiry.

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1. Introduction

- 1.1 This note provides guidance for resolving appeals against regulatory decisions under the Environmental Permitting (England and Wales) Regulations 2010 ('the Regulations'). You should read it alongside guidance provided by the Planning Inspectorate - England and - Wales (PINS)¹ and staff must refer to our Operational Instruction (OI) for Appeals.
- 1.2 Appeals are made to the Secretary of State for permits in England and to Welsh Ministers for permits in Wales. They can be resolved by negotiations with the appellant outside the formal process, otherwise the Secretary of State or Welsh Ministers will normally refer the appeal to a Planning Inspector, who can resolve it through written representations, a hearing or an inquiry. The term 'resolution' is used in a broad sense to mean how we get to the end of appeal proceedings.
- 1.3 Note that 2010 Regulations change the 2007 appeals provisions:
- appeals received by the Secretary of State or Welsh Ministers before the specified date under predecessor regimes of surface water discharge consenting, groundwater consents and radioactive substances regulation are treated as having been made under the 2010 Regulations and anything that has happened with that appeal under the predecessor regime is deemed to have been done under the 2010 Regulations. (Note: this would include consultation on the appeal, statements exchanged, hearings held etc).
 - decisions on permits i.e. refusal or granting subject to conditions, made under predecessor regimes prior to the specified date become subject to the relevant 2010 Regulations appeal rights; the times within which an appeal must be lodged will be the longer of the older legislation or period for permits issued under the 2010 Regulations; and will run from the date of the actual decision under the predecessor regime.
- 1.4 This guidance is written for our staff but we make it available to help customers too.

¹ <http://www.planning-inspectorate.gov.uk/>

2. General approach

- 2.1 We should routinely consider the risk of an appeal when making a permitting decision, particularly when deciding permitting approach and when planning changes affecting large numbers of permits. Where an appeal appears likely, early Legal advice should be sought; well before any decisions are made. We should also ensure we have plans for appropriate consultation, communications and NPS staff resources.
- 2.2 Prospective appellants are advised by PINS to try to resolve any difficulties or disagreements with the regulator and that the right of appeal should be exercised as a last resort. The method for formal resolution of appeals is largely a matter for PINS but informal resolution is encouraged within that framework and we can ask for time to do that. Where there is no disagreement about the facts it may be possible for PINS to resolve it by written representations alone. The appellant may withdraw an appeal, in writing, at any time.
- 2.3 PINS initiate the formal process by sending us a copy of the notice of an appeal and it is vital that we then act promptly. We must plan how we will comply with the relevant procedures/deadlines, decide how we can resolve the appeal and who is going to be involved. Delays can put unnecessary pressure on staff to meet critical deadlines and could also limit the options available to us.
- 2.4 Appeals are not always foreseeable. However, resolution of appeals should be given appropriate priority over other work, particularly where a negotiated outcome is possible. Where an appeal cannot be resolved by negotiation, we must give staff sufficient time to prepare written statements for hearings and inquiries. We may need to re-allocate other work to ensure this. Staff should raise any difficulties with senior managers.
- 2.5 We must carefully consider the reasons behind the original decision and the strength of our case when deciding whether to defend our decision through informal negotiation with the appellant or via formal appeal proceedings. Our Legal Services must advise on the arguments. We should defend matters that are important for the environment but not errors and be realistic about the strength of our case. We must always bear in mind that we could face an order for costs if our behaviour is held to be unreasonable.

3. Roles and responsibilities

- 3.1 The officer whose decision is being challenged will usually be responsible for leading the appeal until it is resolved one way or another. However, in some cases it would be better to appoint another person, for example if there are several appeals on the same grounds or where the issues involve national approach or guidance. The relevant line manager should agree this after an initial assessment of the issues under appeal. The important thing is to establish a single person – the case officer – who is the main point of contact with the appellant and who takes overall responsibility for planning and resolving the appeal. We should manage complex cases involving several people and issues as a project.
- 3.2 A case officer is not expected to resolve all aspects of the appeal on their own. He or she will work throughout, at the very least, with colleagues from Legal Services and National Operations Services (NOS).
- 3.3 Legal Services will advise on implications, how to resolve the appeal, preparation of formal documents (such as hearing statements) and other correspondence with appellants and PINS, as well as preparations for, and during, appeal hearings.
- 3.4 Case officers should always get advice from the relevant NOS lead on how to resolve the appeal, using previous experience. NOS colleagues can also advise on the wider implications of an appeal on national guidance and procedures, as we may need to amend our regulatory tools.
- 3.5 A national appeals co-ordinator keeps a database of all appeals under the Regulations. The co-ordinator should track the status and progress of each case, prompt case officers before key dates and be the single point of contact for all written correspondence with PINS. Case officers must ensure that the appeals co-ordinator is copied into any correspondence they get from PINS, so records can be kept up to date.

4. Preparing a plan

4.1 The appeals process can be complicated both technically and procedurally, with firm and relatively short deadlines. We therefore need to act promptly in developing a case plan. This will:

- establish the issues and identify what support is required;
- identify all officers involved in the case and what their role is;
- arrange the discussions necessary to decide how we can resolve it;
- make a plan to meet PINS deadlines.

The case plan must ensure that we have carefully considered the options and implications of the appeal and that everyone necessary is involved. Actions may change over time, so it is important that the case officer keeps the plan updated.

4.2 Appeals that include permit template conditions, legal interpretations or national positions need careful handling. We will need to ensure resolving the appeal does not undermine consistency of regulation. Case officers must consult NOS, Head Office and Legal colleagues on national issues.

4.3 The case officer for appeals against permitting decisions will usually be the National Permitting Service (NPS) or Radioactive Substance Regulation (RSR) officer that made the decision. In these cases, it is important that the Area compliance team is informed of the plan to resolve the appeal and any implications this has for compliance and enforcement activity. In some cases, resolution of the appeal might depend on timely action by compliance teams in dealing with submissions such as improvement conditions. Case officers should also check whether there are any proposed variations to the permit under appeal (initiated by us or the appellant) and consider how these may affect resolution of the appeal. The status of the appealed notice or permit condition must be established and implications taken into account. Generally, stand alone water discharge activity permit conditions which are varied by the us do not take effect until the appeal is resolved but legal advice should be taken on each specific case.

4.4 The case officer for appeals against enforcement decisions will usually be the Area or RSR officer that made the decision. An Area case officer should liaise with the NPS to check whether there is any permitting or variation work that might affect or be affected by the appeal.

5. Getting more time

- 5.1 The case officer should be looking at all times for opportunities for an informal resolution, if appropriate in the specific circumstances. Either party may change its position at any stage during the formal appeal preparation. If there is a good possibility of an informal resolution, we have found PINS will try to help if a request is made for the appeal to be suspended (put into abeyance) or for an extension to a deadline. If this is done at an early stage, it can avoid much effort by both parties. For example, preparing statements for submission.
- 5.2 Do not assume that PINS will always grant requests for abeyance or extension of deadlines. Requests to PINS for additional time must be made in sufficient time to allow them to consider the request and discuss it with the appellant. We must ensure that we are able to submit statements etc to the original deadline if PINS do not agree the request.
- 5.3 In general, PINs will likely agree requests for extensions or periods of abeyance if both parties are working to resolve the issues and agree to the extension or abeyance. The case officer should provide justification for any proposed extension or abeyance period and try to agree such proposals with the appellant ahead of the request to PINS. The period of abeyance or extension will be for a specified time.
- 5.4 PINS will usually contact both parties at the end of an agreed abeyance period to get views on whether progress has been made to resolve matters.

6. Preparing for a hearing or inquiry

- 6.1 Legal Services will advise case officers on drafting of formal submissions, including written representations, hearing statements, statements of case and proof of evidence. These should be started some weeks in advance of the submission dates to give enough time to get the views of technical and Head Office colleagues where necessary, and for Legal Services to do final checks. Case officers must also ensure that all relevant documents are attached and that administrative officers are given enough time to make the number of paper copies which PINS require.
- 6.2 Hearings are generally in front of a Planning Inspector and in an informal round table setting. Members of the public may attend. There are no rules governing the format but PINS will apply the spirit of the Town and Country Planning rules for England or Wales. The inspector will have read the written submissions beforehand. He/she will ask questions of both parties to clarify uncertainties. Solicitors do not usually attend hearings, but may do so where there are legal issues that they might be able to assist with. Appellants can choose to be represented by anybody, including a solicitor or barrister. In this circumstance, Legal services will advise the case officer on appropriate representation for the Environment Agency. The Planning Inspector may wish to visit the site following the hearing.
- 6.3 Inquiries are a formal process, usually involving legal representatives. Again, members of the public may attend. Witnesses are called to give evidence under the supervision of his/her legal representative, either by reading the proof of evidence or by being taken through the evidence. They are then cross-examined by the appellant and possibly by third parties. This is not a court of law, so the rules of evidence do not apply.
- 6.4 Witnesses must address the inspector when speaking at a hearing or inquiry. Legal Services will provide help for witnesses preparing to give evidence. It is important to take sufficient time, to be clear and simply answer the questions by reference to the work completed and decisions made.
- 6.5 The inspector has wide discretion as to how a hearing or inquiry proceeds. For example, he may request that both parties make another attempt to resolve an issue during the proceedings or he may provide his own decision based on the evidence presented by both parties. He can decide to turn a hearing into an inquiry.
- 6.6 As the regulator, the Environment Agency will normally be responsible for arranging a venue for the hearing or inquiry, publishing notices and other local administrative arrangements. PINS will advise on what is required.

7. Compliance and enforcement

- 7.1 We must take into account how an appeal is being resolved when considering enforcement action on a permit condition under appeal. For example, we may have agreed with the appellant that, subject to provision of satisfactory supporting information, the condition will be varied. Compliance officers should discuss our approach to the appeal with the case officer and can refer to it in their Compliance Assessment Record (CAR). In some cases, an interim compliance position may be agreed with the operator as a step in reaching a resolution, eg undertaking some low or no cost actions to reduce the environmental impact of an issue.
- 7.2 The effect of the appeal on the permit conditions, notice, revocation or suspension need to be clearly established. Refer to the Regulations and Core Guidance.
- 7.3 There may be exceptional circumstances where a compliance officer needs to enforce a condition under appeal. For example, where there is significant risk to the environment. The officer must get advice from a Regional Solicitor before proceeding and discuss it with the appeal case officer, so we can consider how it affects reaching a resolution. We must consider the specific circumstances of the case in applying our Enforcement and Prosecution Policy.