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SUMMARY

This is high level guidance to our staff on how to use enforcement powers at regulated facilities including installations, waste operations, radioactive substances activities, mining waste operations, water discharge activities and groundwater activities under the Environmental Permitting (England and Wales) Regulations 2010 (EPR) as amended. We are publishing it so everybody can see our approach.

This guidance covers all the powers that are available to you to help achieve outcome focused regulation. It is intended to help you understand each power, how they can be used in combination with each other. You should decide on the appropriate level of response by applying the Enforcement and Prosecution Policy.

The guidance describes the enforcement tools available in detail.

It will help us decide which powers to use where similar powers exist under EPR, the Environmental Protection Act 1990 (EPA) and the Water Resources Act 1991 (WRA). It specifically deals with the interaction between:

- section 33 of the EPA and regulation 38 of the EPR;
- section 71 EPA and regulation 60 EPR;
- section 202 WRA and regulation 60 EPR;
- sections 59 and 59ZA of the EPA and regulation 57 EPR; and
- section 161A WRA and regulation 57 EPR.

It will help staff and operators identify issues we need to consider before deciding upon the appropriate action.

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1. Introduction

- 1.1 This guidance is to assist officers in understanding the enforcement powers available for regulated facilities including installations, waste operations, mining waste operations, radioactive substances activities, water discharge activities and groundwater activities under the Environmental Permitting (England and Wales) Regulations 2010 (EPR) and in respect of waste under Part II of the Environmental Protection Act 1990 (EPA). You should decide on the appropriate level of response by applying the Enforcement and Prosecution Policy.
- 1.2 This guidance does not deal in detail with suspension and revocation powers available for non-payment of charges, but see the restrictions on using EPR powers to deal with non-payment of charges at paragraph 3.60, below.
- 1.3 This guidance is intended to help you understand the enforcement powers under EPR, and to give you the confidence to be able to use them in combination with each other to achieve the best environmental outcome.
- 1.4 The guidance covers the following:
 - EPR, Regulations 20 (variation of permits), 22 (revocation of permits), 36 (enforcement notices), 37 (suspension notices), 38 (offences), 42 (enforcement by the High Court), 44 (power of court to order remediation), 57 (power to prevent or remedy pollution), and 60 (power to obtain information);
 - EPA, Sections 33 (offences), 59, 59ZA (notice to remove waste and/or remediate land), and 71 (power to require information);
 - The interaction between powers under the EPR and the EPA and the EPR and WRA.
- 1.5 It may be helpful to use the guidance on EPR enforcement powers in the following way, depending on what it is you are trying to do and what activity you are interested in:
 - **Investigation:** to investigate or obtain information, advice and guidance (section 2, below) information notices (paragraphs 5.1 – 5.19, below);
 - **To stop offending:** suspension notice (paragraphs 3.36 -3.55, below), prohibition notice (paragraphs 3.76-3.77, below), notice requiring a permit (paragraphs 3.78-3.81, below), injunction (paragraphs 4.1 -4.3, below), and/or Anti Pollution Works Notices (paragraph 7.30 below) revocation notice (paragraphs 3.56 -3.72, below),
 - **To restore and/or remediate:** to secure remediation of pollution that has already occurred see especially: enforcement notice (paragraphs 3.18 -3.35, below), remediation notices (paragraphs 7.1 -7.30, below);
 - **To bring under regulatory control:** variation notice (paragraphs 3.14 -

3.17, below), enforcement notice (paragraphs 3.18 -3.35, below), suspension notice (paragraphs 3.36 -3.55, below), remediation notices paragraphs 7.1 -7.30, below);

- **To deter or punish:** offences (paragraphs 6.1-6.12, below), injunction (paragraphs 4.1 -4.3, below), stop notice (paragraphs 4.4-4.14, below).

1.6 Our actions should:

- aim to change the behaviour of the offender
- aim to eliminate financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction
- be proportionate to the nature of the offence and harm caused
- aim to restore the harm caused by regulatory non-compliance, where appropriate
- aim to deter future non-compliance.

2. Advice and Guidance and Warnings

2.1 In this part and the following parts of the guidance we are going to look at the various powers available under the EPR, issues you need to consider in using them, and how they may be used with other powers. If the case is complex or you have any doubts about what to do, you should discuss this with your Regional legal team as soon as possible.

Advice and guidance

2.2 We aim to provide advice and guidance to assist an operator to come back into, or remain in, compliance at all stages in the regulatory cycle.

2.3 In the context of enforcement, we will normally provide advice and guidance after the commission of an offence, or where an offence is likely, unless this may undermine any enforcement action.

2.4 However, provision of advice and guidance will not normally be the only response we make unless

- the offending is very minor; and
- the operator can demonstrably return to compliance as soon as reasonably practicable.

2.5 This advice and guidance may be either verbal or written but will be recorded and, if the non-compliance is subject to CCS will be scored. In

the event of continued or further, non-compliance(s) this will influence the subsequent response.

- 2.6 We will also seek, where possible, to achieve a lasting solution to a problem that is causing offences to be committed
- 2.7 In some simple and very minor cases a discussion with the operator with a view to resolving site problems and preventing their recurrence may be sufficient. This approach can be more effective than formal action to resolve small problems. If you take this approach you should make a clear note on the file of what you have done and why. This could be important if the discussion does not result in an improvement or there is a repeat of the breach and will help justify more formal action.
- 2.8 If the operator is required to maintain and implement plans under the permit (e.g. management arrangements, accident plans, odour management plans, working plans), it may be appropriate to seek revisions to those plans.

Warnings

- 2.9 A warning letter or site warning using the CAR1 form may be appropriate in relation to a minor breach of condition. Note that CAR1 form is not used for all regimes, for example the Integrated Inspection Form (IIF) is used for farms. The appropriate form for the sector should be used.
- 2.10 All breaches of condition will typically be recorded on the CAR1 form and Compliance Classification Scheme (CCS) and this is likely to affect Operator Pollution Risk Appraisals (Opra) scores and charging. Opra does not currently apply to intensive farming activities, radioactive substances activities. Opra charging does not apply to water discharge activities or groundwater activities. Any regime specific reporting requirements, for example, any non compliance with groundwater activity permits on agricultural land need to be reported to the Rural Payments Agency / Rural Inspectorate for Wales, will also need to be addressed.
- 2.11 The account manager for the operator, if there is one, should be kept up-to-date of reoccurring issues, particularly serious events, and when issues are occurring at more than one site. The account manager may then raise the issue with the operator, if appropriate. Where the issue is raised a record should be made and kept.
- 2.12 Even where a more serious response is required, advice and guidance should be provided in addition, except where it would undermine the enforcement action.
- 2.13 You should seek advice from legal when enforcement action is being taken before agreeing to any requests for informal discussions about the proposed actions. This is not advice and guidance.

3. Notices: variation, enforcement, suspension, revocation

General points

Appeals to the Planning Inspectorate

- 3.1 An operator can appeal against the issue of a variation notice, enforcement notice, suspension notice and revocation notice. An appeal does not have the effect of suspending the notice, except in the case of revocation or for standalone water discharge activity Agency initiated variations. You should keep in mind that if an appeal is made you will have to justify why you served the notice. In the case of variations you will have completed a decision document which sets out your reasons for serving the notice but you should record the reasons for your decision to serve any notice. This will make it easier for you to justify your decision on appeal if this becomes necessary and will help you to be satisfied that the service of the notice is the right course of action.
- 3.2 Appeals are made to the Planning Inspectorate and the Inspector is entitled to substitute their view for yours. You must therefore be prepared to set out your reasons for taking the action you have in a way that is clear and aimed at persuading the Inspector to agree with your view.
- 3.3 Costs are not normally awarded against the losing party in an appeal but a claim can be made by any party if it considers the other has acted unreasonably, for example having no reasonable justification for the decision or producing evidence too late in the proceedings.
- 3.4 Appeals against the service of a stop notice under the Regulatory Enforcement and Sanctions Act 2008 or refusal to issue a Completion Certificate under such a notice are not made to the planning inspectorate but to the First-tier Tribunal (see paragraphs 4.11-4.14, below). The burden of proving the stop notice was lawfully served (i.e. is procedurally correct and we have adequate evidence justifying the service of the notice) is on us. The Tribunal has similar powers to the planning inspector in awarding costs. It is likely that any appeal against the service of a stop notice will be fast-tracked by the Tribunal so we will need to be fully prepared to justify our decision to serve the notice.

Compensation claims

- 3.5 Concern is sometimes expressed that the service of a notice could lead to a claim for compensation. EPR contains no specific provisions on compensation where notices are served. There are provisions for compensation under the Regulatory Enforcement and Sanctions Act 2008 (see paragraphs 4.11-4.14, below) but these apply only where civil sanctions have been used. If a complaint is upheld by the Ombudsman compensation can be recommended as part of that finding and the Ombudsman has wide powers to make whatever recommendations are considered appropriate.

- 3.6 A claim for compensation based on the inappropriate service of a notice under EPR would have to either be attached to a complaint to the Ombudsman, or to court proceedings for judicial review or through a civil court proceedings for negligence. Judicial review proceedings are not normally allowed where the claimant has a statutory right of appeal (as the operator does in the case of EPR variation, enforcement, suspension and revocation notices). Even if they are, the claimant would have to show that we had acted beyond our powers or in a way that no properly informed regulator would have acted. The court is not going to impose its view for yours providing it is satisfied that the view you came to is one that could have been reasonably reached. Similarly, it is unlikely that a claim in negligence could be made where regulatory functions are exercised reasonably and in good faith – even where a particular decision is subsequently overruled on appeal. The risk of a compensation claim resulting from the service of an EPR notice is therefore low.
- 3.7 Any risk of a compensation claim that there may be, should not in any event deter you from serving a notice in an appropriate case. As long as you had sound reasons for serving the notice and the decision was a reasonable one, any claim for compensation is unlikely to succeed, even if an Inspector on appeal subsequently disagrees with your view.

Identity of the operator

- 3.8 Many notices can only be served on the operator of a regulated facility. If you are unsure who to serve the notice on you should consult your legal team. The operator is the person in control of the regulated facility. However, where the permit was formerly a Waste management licence (WML), the person who was the holder of the WML will be deemed to be the operator of the regulated facility by virtue of regulation 69(2) of the Environmental Permitting (England and Wales) Regulations 2007 and will continue to be under the 2010 Regulations. This person may not actually be operating the site as normally understood under the EPR and you may think, in a particular case, that this is giving rise to problems. In such a case it may be appropriate to seek a transfer of the permit to the person who is actually operating the site. If the parties are not prepared to co-operate in the transfer of the permit you should consider whether the permit should be revoked as it is no longer held by the operator. Note criminal charges can be brought against any person committing the offences and are not restricted to the operator. In some limited cases, such as where the operator is in liquidation it might be appropriate to serve a notice a person other than the operator, such as the liquidator or landlord. You must seek legal advice before you serve a notice in those circumstances. You should also seek legal advice if the operator is in custody and a notice needs to be served.
- 3.9 Information notices can be served on any person (see paragraphs 5.1-5.15 below).

Legal Advice

- 3.10 A draft variation, enforcement, suspension or revocation notice (and supporting documents) should normally be discussed with and submitted for consideration by the legal team. If

- i) you consider it likely that the operator will appeal the notice,
- ii) you consider it likely that the operator will not comply with the notice and a prosecution may result,
- iii) there is any uncertainty as to the wording of the condition in question or the document the condition refers to, or
- iv) the issues are complex.

you should raise this with the legal team as soon as possible.

- 3.11 The legal team should always be consulted before service of a suspension or revocation notice unless it is not possible due to the urgency of the situation. (see paragraphs 3.53 and 3.73, below).
- 3.12 You should prepare for appeals, legal advice should therefore be sought as early as possible in the process. It is likely that the Permitting Centre should also be involved in preparation of any revocation notice so that they can provide advice on steps needed to restore land to the original state, where appropriate and the use of Regulation 23 for ongoing works (paragraph 3.68, below).

Variation notice – regulation 20

- 3.13 A variation notice can be used to bring a permitted activity or operation under regulatory control.
- 3.14 Normally a request for a variation would be made by the operator but Regulation 20 EPR says that we may vary an environmental permit on our own initiative. No specific test for the exercise of this power is given, but it will be necessary to justify a decision to vary, for example by reference to policy or the Directives relevant to the activity in question.
- 3.15 In some cases, you may think there is a permit condition that addresses an issue but perhaps not as clearly or specifically as it could. Variation could be a way forward. If you think that a variation of a condition is needed because the conditions doesn't deal with the issue as well as it might there should be discussion with the Permitting Centre and Legal Services before the variation notice is issued. If you think there might be an argument about whether a condition had been breached, you should seek legal advice.
- 3.16 Variation may also be more appropriate where you wish to require the operator to undertake something significantly different to what he is currently doing, especially where this might require significant investment. You will need to have clear justification for the variation as there is a right of appeal against a variation notice.

Enforcement Notices – regulation 36

- 3.17 An enforcement notice can be used to restore or remediate harm or damage or to bring an activity or operation under regulatory control.

- 3.18 Regulation 36 EPR says that we can serve an enforcement notice where an operator (including a deemed operator) has contravened, is contravening or is likely to contravene an environmental permit. In most cases, if advice and guidance or informal requests for compliance with a condition have not worked or are not appropriate, this may be the first tool used to bring an operator back into compliance with their permit.

Content of an Enforcement Notice

- 3.19 Regulation 36(2) says an enforcement notice must:
- Contain a statement that we have formed the view that the permit has, is or is likely to be contravened;
 - Say what constitutes the contravention or makes the contravention likely,
 - Say what steps must be taken to remedy the contravention or ensure the likely contravention does not occur; and
 - Specify the time within which those steps must be taken.
- 3.20 You can include both steps to make the regulated facility compliant with its permit and steps to remedy the effect of pollution caused by the contravention
- 3.21 It is not, however, sufficient to simply require compliance with the condition. In some cases it may be appropriate to simply prohibit something happening, for example, to stop accepting a particular waste, which is not authorised by the permit, at a facility. In most cases, however, you must give some reasonable indication of the technical or procedural steps you require the operator to take in order to comply. It is acceptable to setting out the overall aim of the notice, such as compliance with the condition and saying this can be done by, but not limited to, taking the following steps.

A sensible approach might be to require measures that you are reasonably sure will solve the problem. You can then specify that option in the notice with a time for implementation. In addition to that requirement you could also as a separate requirement of the enforcement notice allow the operator, if they chose to do so, to propose other measures that the operator can demonstrate will achieve an equivalent outcome and that can be implemented in the same timescale. This allows the operator to make more cost effective proposals but puts the onus on the operator to justify that they will be as effective and achieve the desired outcome.

Withdrawal of an Enforcement Notice

- 3.22 We have a power (not a duty) to withdraw an enforcement notice. There is nothing to stop you withdrawing one notice and serving another requiring different things to be done or the same things to be done in a different time. If you try to shorten the time in the first notice by a new notice you will have to have very good reasons to be able to justify that, especially if the operator has already taken some steps or let contracts to comply with the first notice within the time specified in that notice. If a notice is withdrawn it no longer has any effect so enforcement action can not be taken in relation to it.

- 3.23 If we issue an enforcement notice but subsequently decide we should not have done so, for example, because there is doubt whether the operator did breach a condition, the notice contains drafting errors or we decide its requirements were not reasonable, we should withdraw the notice. If we withdraw a notice on this basis, the operator will not be required to declare that a notice has been served for the purposes of their OPRA profile. It may be that the notice covers more than one breach. If we are satisfied that there is insufficient evidence for some but not all of the breaches mentioned in the notice, the notice should be withdrawn and replaced with a new notice (if it is appropriate to do so) limited to those breaches where we do have sufficient evidence. In such a case the OPRA score for the breach(es) that can not be proved should be removed. The score for the breaches we can prove should remain. The operator will not have to declare the original notice has been served for the purpose of OPRA scoring but will have to declare any replacement notice served.
- 3.24 Where a notice has been served but we consider that although there is evidence of a breach the notice is defective, the notice should be withdrawn. The score for the breach should remain but the operator will not be required to declare that a notice has been served for the purposes of their OPRA profile. If the breach remains a problem, consideration can be given to serving a further notice.
- 3.25 We should also withdraw a notice once we are satisfied it has been complied with. Enforcement notices are required to contain a time period for compliance and should not be used as a means of ongoing regulation, so they should be withdrawn when they have been complied with. Since both enforcement notices and notices withdrawing them are required to be placed on the public register, there will be a permanent record of the notice having been served. Once a notice has been withdrawn, any appeal against it that has been made, will not be progressed by the Planning Inspectorate. In this case there is no need to adjust the OPRA scores because they should reflect the need to obtain compliance by use of an enforcement notice and the operator is required to declare that a notice has been served for the purpose of their OPRA profile.
- 3.26 There may be cases that do not fall neatly into the situations described in paragraphs 3.22-3.25, for example, a notice may not have been fully complied with but complied with to an extent so that we are satisfied the problem has been addressed. In these cases you should discuss what to do with you're the legal team.

Points to Note

- 3.27 You should consider the following:
- a) There must be evidence of a breach of the permit (its scope or condition) or evidence that a contravention of the permit is likely. You should satisfy yourself that the condition (including any document you

are relying on that it references) is clear in itself and in terms of the permit as a whole i.e. that there are no inconsistencies in the requirements of different permit conditions or the requirements of a permit condition and a provision in the working plan or the operators management system. If there is an inconsistency between the permit conditions and the working plan or the operator's management system, the permit conditions will prevail.

- b) You must ensure that the notice is drafted sufficiently clearly to give certainty as to what breaches you consider have taken place (or are likely to take place) and as to the steps that must be taken to rectify or prevent those breaches. You should seek legal advice on the drafting if you have any doubts. It will not be possible to enforce a poorly drafted notice and poor drafting would be a ground of appeal.
- c) Although we should aim not to be over prescriptive in the steps we require an operator to take, a requirement simply to "take steps to comply with condition XX" will not be sufficient. The notice power gives you the opportunity to set out specific steps you want the operator take, which can make subsequent enforcement easier. An enforcement notice may be used in conjunction with proceedings for breach of the condition, in isolation or as a means of giving the operator more time to comply with a condition. Also, it may be the most proportionate initial approach to a breach of condition. Issuing an enforcement notice does not prevent you taking proceedings for breach of the condition.
- d) The requirements of the notice must be reasonable. A common ground of appeal would be that the requirements of the notice are not reasonable. Often this is likely to be in respect of the time allowed to comply with the steps. What you think is reasonable may not be the same as an Inspector finds on appeal. However, you should include a period of time that you can justify, recognising that the overall objective is to obtain compliance with the conditions of the permit. If there is urgency that the permit conditions are complied with you might need to consider other powers, such as suspension or injunction.

Breach of enforcement notices

- 3.28 If an operator does not comply with the enforcement notice, either because they do not do what is required of them or they do not do it within the time specified an offence is committed. You will need to consider whether it is appropriate to prosecute for that breach. If you decide to prosecute and the notice is appealed, it is likely that a Court will wish to adjourn any prosecution proceedings pending the outcome of the appeal.
- 3.29 If a person is convicted of failing to comply with an enforcement notice, the Court, in addition to any penalty imposed, may order that person to take steps to remedy the matter under regulation 44.
- 3.30 If you can demonstrate that taking prosecution proceedings would afford an ineffectual remedy, especially where a fast response is required, we have a

power under regulation 42 to take proceedings in the High Court for an injunction to secure compliance. It is not always necessary to show that a prosecution has already been taken before considering this option - see paragraphs 4.1-4.3 below.

- 3.31 Breach of an enforcement notice does not automatically allow the service of a suspension notice, as used to be the case under EPA. A suspension notice will be worth considering but is only available if you are able to show that as a result of the delay in complying with the enforcement notice, a risk of serious pollution is present.
- 3.32 In extreme cases, you might consider revocation or partial revocation of the permit. In considering this power as a subsequent mechanism of enforcement for failure to comply with the conditions of the permit you should look at the seriousness of the breach, the compliance history of the operator under the permit generally, the number of enforcement notices previously served and whether they were complied with and other public interest factors.
- 3.33 If the breach has caused pollution, you may want to consider exercising the power in regulation 57(2) to take steps to remedy the effects of that pollution. Note there is no need in this particular case to demonstrate serious risk, which is required for interventions in advance of enforcement notices. See paragraphs 7.1-7.4 below. If the pollution results from waste deposited outside the terms of the permit you may alternatively consider using section 59 EPA as this actually requires the person depositing or knowingly causing or knowingly permitting the deposit to undertake the work (if they are the occupier or owner – see section 7.1 – 7.30 below. Similarly you may also consider using section 161A of the Water Resources Act 1991 (WRA) to require the person who caused or knowingly permitted polluting matter to enter controlled waters to undertake work to prevent, remove or remedy pollution – see section 7.30 below.

Suspension Notice – regulation 37

- 3.34 Suspension notices can be used to stop offending or to bring an activity or operation under regulatory control. In doing so they may also include remediation steps.

Power to suspend

- 3.35 Regulation 37(1) says that if we consider that the operation of a regulated facility under an environmental permit involves a risk of serious pollution we can serve a suspension notice on the operator. The effect of a suspension is to stop an operation being carried on. A suspension notice can be used where something has already happened to cause a risk of serious pollution or where we consider that something is likely to happen that will cause a risk of serious pollution. There will be some cases where it is necessary only to suspend part of the operations or activities allowed under the permit to achieve the outcome. You should not simply automatically suspend the

entire permit. You should consider how much of the permit needs to be suspended to deal with the risk of serious pollution.

- 3.36 There can be a risk of serious pollution even if the permit conditions are being complied with. Compliance with the permit conditions is not a factor to be considered in deciding whether or not to issue a suspension notice.
- 3.37 Suspension notices should be regarded as a measure to be used where it is necessary to prevent a risk of serious pollution (paragraphs 3.43-3.45 below). It cannot be used as a mechanism simply to address a breach of an enforcement notice; we need to be satisfied there is a risk of serious pollution to use of these powers. A decision to serve a suspension notice will have serious implications for the operator's business and therefore should not be taken lightly but it is likely to be effective at encouraging a prompt response and does not criminalise the operator. However, the implications for the operator should not deter you from serving a notice where you think it necessary to avoid a risk of serious pollution. Suspension of a permit at a waste site may also make the delivery of waste to that site unlawful if that part of the permit is suspended.
- 3.38 Note the relationship between the power to suspend and the power to take steps ourselves to remove the risk at the operator's expense (see remediation notices at paragraphs 7.1-7.4 below and EPR regulation 57 ahead), because both powers are available where there is a risk of serious pollution.

Content of Suspension Notice

- 3.39 Regulation 37(3) says a suspension notice must:
- Contain a statement that we have formed the view that the operation carried out under the permit involves a risk of serious pollution;
 - Say what that risk of serious pollution is;
 - Say what steps must be taken to remove the risk;
 - Specify the time within which those steps must be taken;
 - State that the permit ceases to have effect to the extent specified in the notice; and
 - If the permit continues to authorise an operation, it must state any steps (in addition to those already required by permit conditions) that are to be taken when carrying out that operation.
- 3.40 In some cases a suspension notice, if complied with, will have the effect of stopping the risk of serious pollution, but the risk will immediately arise again once the notice has been complied with. In those circumstances, you should consider whether the permit condition needs to be varied to prevent the risk.

Withdrawal of Suspension Notices

- 3.41 We may withdraw a suspension notice at any time and must do so when satisfied the steps have been taken (whether or not this is before the time specified in the notice). If the operator notifies you that the notice has been

complied with, or you believe that to be the case, you should inspect promptly and if satisfied you must withdraw the suspension notice.

- 3.42 It is possible to withdraw one suspension notice and replace it with another, perhaps refining or clarifying the steps to be taken. But you need to be aware that this is not usually good practice and there should be clarity and certainty in each suspension notice served. If you have to change the notice to impose greater requirements, the operator may raise arguments about the reasonableness of the notice.

Points to note

- 3.43 You must be satisfied that there is a risk of serious pollution. That means you will have to identify what the serious pollution is and why there is a risk of it occurring or continuing.
- 3.44 “Pollution” is defined in the Regulations as:

Any emission as a result of human activity which may

- a) be harmful to human health or the quality of the environment,*
- b) cause offence to a human sense*
- c) result in damage to material property, or*
- d) impair or interfere with amenities and other legitimate uses of the environment.*

except in relation to water discharge and groundwater activities where it means:

the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may—

- a) be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems,*
- b) result in damage to material property, or*
- c) impair or interfere with amenities or other legitimate uses of the environment.*

- 3.45 Whether there is a ‘risk’ of “serious” pollution is a matter of judgement. You will have to justify the judgement in relation to the seriousness and risk by showing the effects on the environment or health and demonstrate that there is some reasonable likelihood that these could have a long term negative impact or a significant immediate detrimental impact. You will have to have clear evidence from which you make this assessment and be able to justify forming that view. If forming this judgement is not clearly within your area of expertise, you should seek the view of a person who is an expert. Your view is very likely to be challenged if there is an appeal or we prosecute for breach of the notice. Generally speaking a Cat 1 or Cat 2 non-compliance will mean that serious pollution is or is likely to occur.
- 3.46 The specified steps can only be steps which are necessary to remove the risk of serious pollution. You cannot go beyond this. The Core Guidance says that a suspension notice should allow activities that are not related to the risk of serious pollution to continue. This means that you should always

ensure that you only suspend the permitted activity / activities to the extent necessary to avoid the risk of serious pollution.

- 3.47 You must specify the time within which those steps must be taken. The time must be reasonable and take into account both the possibility it can be achieved and the risk to the environment if this time is too long. What is a reasonable period of time may seem shorter to you than to an Inspector having heard from the operator as part of an appeal. You must be able to justify the time you have specified. An operator can always comply and notify us before the specified time.

Breach of a suspension notice

- 3.48 If an operator does not comply with the suspension notice, either because they do not do what is required of them or they do not do it within the time specified, an offence is committed. If the operator continues to operate whilst a suspension notice is in force, they are committing an offence of operating without a permit. You will need to consider whether it is appropriate to prosecute for that offence. The operator might seek to adjourn such a prosecution pending determination of an appeal against the notice, but we would normally resist such an application because of the seriousness of the situation. We will need to be able to set that seriousness out in simple terms for a court to support our view that the prosecution should proceed. You should keep in mind that the suspension notice may suspend a particular operation. There may be a number of operations allowed by the permit. The operator can, of course, continue to carry out those operations not covered by the suspension notice.
- 3.49 If a person is convicted of failing to comply with a suspension notice, the Court may order that person to take steps to remedy the matter under regulation 44.
- 3.50 If you can demonstrate that taking prosecution proceedings would afford an ineffectual remedy, especially where a fast response is required, we have a power under regulation 42 to take proceedings in the High Court for an injunction to secure compliance. It is not always necessary to show that a prosecution has already been taken before considering this option - see paragraphs 4.1-4.3 below.
- 3.51 You might consider revocation of the permit. You should not assume that failure to comply with a suspension notice must automatically lead to revocation of the permit but if you can show that the operator has no clear plan for addressing the suspension notice (albeit late) and that there is a continuing risk of serious pollution, you are likely to be able to justify the service of a revocation notice (see paragraphs 3.54-3.73, below).
- 3.52 The power in regulation 57(2) to take steps to remedy the effects of the risk of serious pollution at the operator's expense is also available. [See paragraphs 7.1-7.30 below] If the pollution results from waste deposited outside the terms of the permit you may also consider using section 59 EPA that requires an occupier or owner who deposited or knowingly caused or knowingly permitted the deposit to undertake the work. Similarly you may

also consider using section 161A of the Water Resources Act 1991 (WRA) to require the person who caused or knowingly permitted polluting matter to enter controlled waters to undertake work to prevent, remove or remedy pollution.

Legal Advice

3.53 The legal team should always be consulted before service of a suspension notice unless it is not possible due to the urgency of the situation. When consulting the legal team about suspension you should provide the following information:

- background – where the site is and what activities it undertakes;
- any previous action that has been taken in relation to this issue at the site – to include any meetings with the operator, site inspection findings, letter and notices;
- what the current situation is and why you consider that there is a risk of serious pollution;
- what steps you require and why you feel these are necessary and reasonable to remove the risk of serious pollution and why you feel the time in which to take the steps is reasonable;
- what consultation you have had with the operator, or if none, why; and
- why you feel it is necessary and reasonable to suspend to the extent that the notice would do so.

Revocation Notices – regulation 22

3.54 Revocation notices can be used to stop offending.

Power to revoke and relevant convictions plans

3.55 The power to revoke is expressed in very wide terms within regulation 22. Revocation may be appropriate where exhaustive use of other enforcement tools have failed to protect the environment. There may also be some cases where on-going pollution is occurring and neither the operator nor we can think of a solution. In those cases partial or complete revocation is probably the only practical option and you should gather evidence to justify revocation. Revocation based on previous poor compliance should be based on the same test as whether a permit should have been granted to the operator at all. You will need to demonstrate a history of breaches so that if an appeal is made, an Inspector would be able to say objectively that the operator was not complying with the permit when considered as a whole. Revocation after a relevant conviction should satisfy these requirements.

3.56 Revocation may also be appropriate where, despite every effort by the operator and ourselves it has not been proved possible to resolve an issue of serious pollution at a site. It is our duty to ensure that regulated facilities do not give rise to serious pollution and the power to revoke is available to us to secure this, even in cases where the operator has used reasonable endeavours to try to resolve the problems.

- 3.57 You should consider revoking the permit to the least extent needed to solve the problem, for example you may need only revoke the permit to prevent one of a number of activities being carried on rather than the entire permit

Revocation for administrative reasons

- 3.58 Revocation can in limited circumstances also be used for administrative reasons but revocation must not be used as or allowed to be seen as an alternative to proper surrender of a permit. You can not use the powers under the EPR to fully revoke a permit simply because the charges due in respect of that permit have not been paid. Note the power to impose a charge in regulation 65 does not apply to us. That power is only for local authorities issuing a Part B permit under schedule 1. How to deal with non-payment of our charges is covered by the Environment Act 1995. That Act overrides the EPR in this context. Section 42(6) of the Environment Act 1995 says if any charge has not been paid, we may, if we comply with the appropriate procedure, suspend or revoke the environmental licence to the extent that it authorises the carrying on of an authorised activity. So you could only revoke to the permit to prevent the continued operation but could not revoke the permit entirely. The appropriate procedure is set out in the Environmental Licences (Suspension and Revocation) Regulations 1996¹. The requirements of these regulations are satisfied by notification on our invoices. Normally you would only suspend the permit rather than revoke for non-payment of charges. Revocation of one or more authorised activities will affect the charge payable in subsequent years.

Permit has never been operated

- 3.59 However, where the permit has never been operated, it may be appropriate to revoke the permit. There will sometimes be good reasons why an operator has obtained a permit but has not started operations. It would not be appropriate to revoke the permit in those cases simply because there is a delay in the start of operations. It would be appropriate to revoke the permit where the permit has not been operated for a long time, or where it is obvious that the permit has never been utilised and is not likely to be, for example, where the land is now being used for other purposes.
- 3.60 Once a full revocation takes effect no future charges are due. A partial revocation will affect the level of future charges. Any outstanding charges remain payable by the operator. Generally we should seek to recover those charges if we know where the operator is and can make contact with them. If we have made genuine attempts to locate the operator, which we should record, but have been unable to do so you should consider writing off the debt.

Site has been abandoned

- 3.61 Similarly, it maybe appropriate to revoke the permit if the site has been abandoned. However, the first thing to consider is whether the facility is causing an environmental concern. If it is you should be cautious about revoking the permit but you should consider whether adequate governance over the site can be maintained using the powers under Regulation 23 (paragraph 3.68, below). Nevertheless, it needs to be recognised that

simply continuing the existence of a permit, where the operator has abandoned the facility is not of itself going to address those environmental concerns. Whether and, if so, when the permit should be revoked is a factor to be included in your plan to deal with the environmental risk.

- 3.62 To revoke as above we need to be satisfied that the site has been abandoned. This does not mean that the operator has simply left the site. If we can find the operator we should encourage them to use the surrender provisions of the EPR to bring the permit to an end. Revocation must not be allowed to be seen as an easy option to be used in place of surrender. You should be cautious about concluding a site has been abandoned unless you have had no contact with the operator for at least two years.
- 3.63 Once the revocation takes effect no future charges are due. To properly conclude that the site has been abandoned we will have already tried to make contact with the operator, and been unable to do so, you should consider writing off the debt. Before doing so you should contact Finance as restrictions apply to the power to write off debts.

Overlapping permits

- 3.64 The final situation where revocation for administrative reasons may be appropriate involves permits that overlap. Surrender, variation and consolidation of permits will reduce the number of cases in this category. Historically there have been cases where because of the limitations that existed under the EPA, a waste management licence has been granted to cover an area of land (Permit A) that was already covered by another permit (Permit B). Permit A might have covered part of the area covered by Permit B or all of it. Generally the conditions of the Permit B were dis-applied to the area of covered by Permit A.
- 3.65 In those cases, where the whole of the area covered by Permit B is now covered by Permit A, Permit B can be revoked. Once revoked no further charges are due in respect of Permit B. There shouldn't be any separate charges due, because we have applied the adjoining sites rule under the charging scheme to those sites.
- 3.66 Where permit A overlaps permit B only in part, you may consider revoking that part of permit B that is covered by Permit A. In deciding whether that is appropriate, you should consider whether any variation of the Permit B is needed to allow the continued operation of the continuing part of the permit. You should consult with your regional legal teams in deciding whether revocation is appropriate or not.

Contents of a Revocation Notice

- 3.67 A revocation notice must include:
- The reasons for the revocation;
 - In the case of partial revocation, the extent to which the permit is being revoked and any variation to the conditions of the permit;

- The date the revocation takes effect which must be at least 20 clear working days from the date the notice is served.

3.68 If a permit is revoked, there is provision in regulation 23 to require an operator to take steps to avoid a pollution risk from the operation of the regulated facility or to return the site to a satisfactory state having regard to the state of the site when the facility was put into operation. The revocation notice must include details of the steps we require to be taken. Regulation 23 does not apply to mobile plant, stand-alone water discharge activities or stand-alone groundwater activities or Part B installations, except to the extent that they relate to a waste operation.

Withdrawal of Revocation Notices

- 3.69 We may withdraw a revocation notice before the date on which the notice takes effect. The notice takes effect either on the date specified in the notice or where an appeal has been made on determination of the appeal, where the notice is upheld, or on withdrawal of the appeal.
- 3.70 We cannot withdraw a revocation notice after the time it takes effect because as a matter of law the permit (or the part of the permit to which the notice applies) ceases to have effect.

Continued operations after a revocation notice takes effect

- 3.71 This would be an offence under regulation 38 of operating a regulated facility without a permit.

Enforcement while an appeal is outstanding

- 3.72 Generally, an appeal against revocation has the effect of allowing an operator to continue operation under the permit, so, despite the service of a revocation notice, you will need to consider whether other action needs to be taken to prevent continued operation at the facility. You should consider suspension or applying for an injunction preventing the operation (or partial operation) of the regulated facility pending the appeal - see paragraphs 3.34 above and section 4 below. Where a revocation notice relates to a stand alone water discharge activity and we state in the notice that we are of the opinion that revocation of the permit is necessary to prevent, or where that is not practical minimise pollution, the revocation notice takes effect despite any appeal. However if on an appeal it is decided that we were unreasonable in making that statement, we can be required to pay compensation.

Legal Advice

- 3.73 The legal team should always be consulted before service of a revocation notice unless it is not possible due to the urgency of the situation. When consulting the legal team about revocation you should provide the following information:
- background – where the site is and what activities it undertakes;
 - any previous action that has been taken in relation to this issue at the site – to include any meetings with the operator, site inspection findings, letter and notices;

- what the current situation is and why you consider revocation is required;
- what consultation you have had with the operator, or if none, why; and
- why you feel it is necessary and reasonable to revoke to the extent that the notice would do so.

Prohibition Notices - Schedule 22, paragraph 9

- 3.74 This notice can be used to stop offending for a specific groundwater activity.
- 3.75 We may serve a notice prohibiting direct or indirect discharges to groundwater on any person who is carrying on or is proposing to carry on an activity that might lead to such a discharge.

Notice requiring a permit – Schedule 22, paragraph 10

- 3.76 This notice can be used to stop offending for a specific groundwater activity.
- 3.77 We may serve a notice on any person who is, or is intending to, carrying out an activity on or in the ground that might lead to the direct or indirect discharge of pollutants to groundwater requiring them to hold a permit.

Notice requiring a permit – Schedule 21, paragraph 5

- 3.78 This notice can be used to make it an offence to discharge trade or sewage effluent to a lake or pond which is not an inland freshwater without a permit.
- 3.79 We may serve a notice on any person who discharges trade effluent or sewage effluent into the waters of any lake or pond which are not inland freshwaters requiring them to hold a permit.

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4. Court orders under regulation 42 EPR, Injunctions, and Stop Notices under the RES Act 2008

Court Orders and Injunctions

- 4.1 Where we consider that a prosecution for breach of an enforcement notice, suspension notice, prohibition notice, landfill closure notice or mining waste facility closure notice, would afford an ineffectual remedy, we may take proceedings in the High Court for an order under regulation 42 requiring the operator to comply with the notice. We are only likely to be able to demonstrate that prosecution would be an ineffectual remedy if there has been a history of breaches of enforcement notices.
- 4.2 It is also possible to seek an injunction in the High Court to restrain any criminal act, on a similar basis. Injunctions are especially useful where a fast response is needed. Breach of an injunction or court order obtained under regulation 42 would be a contempt of court and the person in breach could be arrested. Injunctions are therefore potentially more directly enforceable than the power to suspend, which of itself only gives rise to an offence.
- 4.3 The court has a wide discretion whether to grant an injunction. It is not always necessary to show that there is a previous conviction, which has not resulted in a change of behaviour of the operator, to obtain an injunction. Any previous conviction, however, will be helpful in persuading the court to grant an injunction. You should not be afraid of considering this option but should be aware that preparing for injunctions can be time consuming and they should not be seen as the easy option. You will need clear and persuasive evidence to be able to demonstrate harm or pollution is occurring or likely to occur and that it needs to be stopped immediately. If the Agency should fail in an application for an injunction it will not only have to bear its own costs, it will in most cases also have to pay the costs of the operator.

Stop Notices

- 4.4 Where you have reasonable grounds to believe an offence under section 33(1) EPA has been committed, or is likely to be committed, and you reasonably believe the activity that is causing, or poses a significant risk of causing, serious harm to human health or the environment and where an offence is being committed you may serve a stop notice under the Regulatory Enforcement and Sanctions Act 2008. A stop notice prohibits the carrying out of an activity until steps specified in the notice have been taken.
- 4.5 You will need to be able to demonstrate the reasons you have come to the view you have. There is no definition of serious in the Act. This will be

a question of fact for you to demonstrate (see paragraph 3.45 on the meaning of serious in the context of suspension notices under EPR).

4.6 The stop notice must set out:

- f* the grounds why it was served;
- f* the steps to be taken to remove or reduce the serious harm;
- f* the right of appeal; and
- f* the effect of non-compliance.

4.7 Failure to comply with a stop notice is a criminal offence.

4.8 There is a right of to appeal to the First Tier Tribunal against the service of a stop notice. An appeal does not have any effect on the stop notice, which remains in force and enforceable while any appeal is pending.

4.9 A stop notice cannot be used for a breach of EPR. If you are considering issuing a stop notice you must consult your Regional legal team.

4.10 Where a stop notice has been served we must compensate a person if, as the result of the service of the Notice or the refusal of a Completion Certificate, that person has suffered loss, and:

- we withdraw or amend the stop notice because the decision to serve it was unreasonable or any step specified in the Notice was unreasonable;
- we are in breach of our statutory obligations;
- the person on whom it was served successfully appeals against the stop notice and the Tribunal finds that our service of the notice was unreasonable; or
- the person successfully appeals against the refusal of a Completion Certificate and the Tribunal finds that our refusal was unreasonable.

4.11 In these circumstances compensation should cover any loss including exceptional costs resulting from the serving of the notice (e.g. legal or expert advice).

4.12 The person who wishes to claim compensation must do so in writing to the address that appears on the stop notice with which they have been served. The claim for compensation (including any negotiations and/or disputes) will be handled by the Legal team.

4.13 Any dispute over whether compensation should be paid or over the amount of any such compensation shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, a person will have the right to appeal to the First-tier Tribunal against our decision not to give compensation or against the amount of compensation.

- 4.14 The compensation scheme is without prejudice to a person's rights to seek redress through the Ombudsman, judicial review or civil litigation.

5. Information Notices

General

5.1 Power to serve information notices is available under EPR (regulation 60) and, in relation to waste, under EPA (Section 71) and, in relation to water pollution, under WRA (Section 202). Power to obtain information is also available within our powers of entry and investigation in section 108 of the Environment Act 1995.

5.2 In terms of notices under EPR EPA and WRA, the following general points apply:

- Any time limit we set for the information to be supplied must be reasonable taking account of the nature and quantity of information being sought.
- It is an offence not to comply with the information notice or to supply false or misleading information.
- There is no appeal against the service of an information notice, but it would be possible for a person to challenge the issue of the notice by way of judicial review if the notice does not relate to our functions or the period of time for reply or information required is unreasonable. What is a reasonable time to you may be different to that which a Court finds reasonable having heard from the person served with the notice. You will have to be able to justify the time you allow for a reply and it may be better to allow more time than risk being challenged on this basis. Similarly, a person served with a notice might challenge the validity of it in any criminal proceedings brought for failure to comply with the notice or any proceedings for supplying false information in response to the notice. Again you will need to be able to justify the service of the notice.
- In some cases we will want to use an information notice as part of our enquiries for alleged offences. In those cases you need to be aware that use of the notice as an evidence gathering exercise needs careful attention. Although there is little to stop the service of the notice, providing we behave reasonably as mentioned above, the use of any response as evidence in any criminal proceedings will not be possible. We therefore need to use the information supplied in the response as a basis for an interview under caution, which will be admissible.
- In other cases you might use an information notice to gather information that enables you to decide whether some other form of enforcement is required. For example, you might seek information about a particular substance in helping you devise the pollution risks of its release and whether an enforcement or suspension notice should be issued.

Regulation 60 EPR

- 5.3 Regulation 60(2) EPR allows us to serve a notice on any person requiring them to provide information specified in the notice in such a form and within a period of time we specify in the notice.
- 5.4 The information required must be needed for the purpose of discharging our functions (powers and duties) under the Regulations. One of our functions is ensuring that activities or operations that need a permit have one. So the notices have a use in regulating unlawful (un-permitted) sites as well as being capable of being served on permitted operators.
- 5.5 We can serve an information notice on anyone we reasonably consider can supply the information, it is not restricted to an operator or potential operators. The power allows us to serve a notice on any person. Generally that will be a person we believe has possession of information that will be able to help us make decisions. However, the regulation also allows us to serve a notice on a person to provide information about emissions even if the information is not in that person's possession and they would not usually come into possession of that information where it is reasonable to do so.
- 5.6 Emissions are defined by the EPR but so far as we are concerned generally mean the direct or indirect release of substances, vibrations, heat, or noise.

Section 71 EPA (waste operations only)

- 5.7 This section allows us to serve a notice on any person requiring them to provide information specified in the notice in such a form and within a period of time we specify in the notice.
- 5.8 The information required must be needed for the purpose of discharging our functions under Part 2 EPA. Those functions include regulating waste that has been fly tipped but also include wastes that are delivered to permitted sites. This might cover situations such as wastes being delivered to facilities not permitted to accept them.
- 5.9 We are not restricted to only serving operators or potential operators. The power allows us to serve a notice on any person. Generally that will be a person we believe has possession of information that will be able to help us make decisions.

Interaction between EPR and EPA information notices

- 5.10 There is an overlap between regulation 60 and section 71 where information is sought in relation to waste operations.
- 5.11 In deciding which notice to use you should consider whether if the information you ask for would be likely to result in some form of enforcement action being taken, what that enforcement action would be and use the notice that is part of the regime under which that action would be taken.

- 5.12 For example if you have a person storing clinical waste without a permit you might want to make enquires of the person in control of that storage but you might also want to make enquiries of local hospitals concerning their waste collection arrangements. For the person in control of the site the potential enforcement action you might want to take is prosecution for not having a permit. Thus it would be more appropriate to use a regulation 60 Notice. The use of that notice would not prevent service of a section 59 or 59ZA notice requiring the waste to be removed because the purpose of the notice is to help us come to a view on whether we consider there is a breach of regulation 12 EPR, which is one of the pre-requisites for service of a section 59 Notice.
- 5.13 In relation to the hospitals' activities you would want to be considering whether they have breached section 33(1)(a) (knowingly caused an unlawful deposit of waste) and whether the duty of care under section 34 of the EPA has been breached so it would be more appropriate to serve a section 71 notice in their case.
- 5.14 In cases where there is a permitted facility and information is sought from the operator or one of their employees it is likely that any action would be taken under EPR and therefore regulation 60 should normally be used.
- 5.15 If the information available to you is insufficiently clear to enable you to decide whether the operation or activity is one that that would fall under EPR or EPA it could be appropriate to serve notices under both provisions. You should seek advice from the legal team if you think this might apply. You must **not** combine the notices into one document.

Section 202 WRA (water discharge and groundwater activities only)

- 5.16 This section allows us to serve a notice on any person requiring them to provide information specified in the notice in such a form and within a period of time we specify in the notice.
- 5.17 The information required must be needed for the purpose of carrying out our functions under the water pollution provisions of WRA. Those functions include use of works notices, Water Protection Zones and powers to control pollution under various regulations.
- 5.18 We are not restricted to only serving operators or potential operators. The power allows us to serve a notice on any person. Generally that will be a person we believe has possession of information that will be able to help us make decisions.
- 5.19 The interaction with Regulation 60 follows similar rules to EPA information notices outlined above. Where the information required relates powers and duties outside scope of EPR then a section 202 Notice should be used otherwise a Regulation 60 Notice is preferred e.g. in relation to information about

water discharges and their control. You must **not** combine the notices into one document.

6. Offences

Regulation 38 EPR 2010

6.1 Regulation 38 EPR sets out a range of offences:

- operating a regulated facility without a permit contrary to regulation 12(1)(a) (including carrying on a waste operation, mining waste operation, radioactive substance activity, water discharge activity or groundwater activity)
- causing or knowingly permitting a water discharge activity or groundwater activity without a permit contrary to regulation 12(1)(b);
- knowingly causing or knowingly permitting the operating of regulated facility without a permit (including carrying on a waste operation, mining waste operation, radioactive substance activity, water discharge activity or groundwater activity);
- failing to comply with a permit condition;
- failing to comply with an enforcement notice, prohibition notice, suspension notice, landfill closure notice or mining waste facility closure notice;
- failing to comply with a regulation 60 information notice;
- making misleading statements in response to requirements made under the Regulations or as part of an application made under the Regulations or to obtain, renew or amend a registration of exemption;
- intentionally making false entries in records required to be kept under a permit;
- with intent to deceive forging documents issued under permit conditions;
- with intent to deceive holding or making documents so closely resembling an authentic document as to be likely to deceive.

6.2 Offences committed due to the acts or defaults of other persons and by certain company officers are also offences.

6.3 The only defence under EPR is for acts done in an emergency and this only applies to the offences of operating without a permit or other than in accordance with a permit.

6.4 The penalties for the offences of operating without, or other than in accordance with a permit above are now £50,000 and/or 6 months imprisonment on summary conviction, or an unlimited fine and 5 years imprisonment on indictment. The maximum fine on summary conviction for those offences committed before 26 January 2009 is £20,000. For all other offences the maximum penalty is £5,000 on summary conviction or an unlimited fine and/or 2 years imprisonment on indictment.

6.5 Under regulation 44, where a person is convicted of an offence for

operating without or other than in accordance with a permit, we can apply to the court for an order requiring the operator to take steps to remedy the effects of the offence. The court will have to be satisfied that it is within the convicted defendant's power to remedy the effects of the offence.

Section 33 EPA (waste)

- 6.6 Section 33(1) contains three provisions:
- a) it makes it an offence to deposit, knowingly causing or knowingly permitting the deposit of waste (including extractive waste) unlawful unless the deposit is covered by and in accordance with an environmental permit or an exemption. Section 33(5) enables a person in control of a vehicle to be liable for an offence under this section;
 - b) it makes it an offence to submit waste (not including extractive waste) to a disposal or recovery operation in or on land or by mobile plant or knowingly cause or knowingly permit that activity unless that operation is covered by and carried out in accordance with an environmental permit or exemption; and
 - c) it makes it an offence to treat, keep or dispose of waste (including extractive waste) in a manner likely to cause pollution of the environment or harm to human health, whether or not the operation is carried out in accordance with an environmental permit. Note this section has been amended so it now applies to water discharge activities and groundwater activities, but see paragraph 6.12 below.
- 6.7 The only defences under section 33 are acting in an emergency, or and taking all reasonable precautions and exercising due diligence to comply with the permit. The burden to prove a defence is on the defendant on the balance of probabilities (i.e. the defendants version of events is more probably than not). However you should keep in mind the possible defences when gathering evidence so that you can gather any evidence that would help rebut a defence.
- 6.8 The penalties are very similar but not identical to the equivalent EPR offences.
- 6.9 Where there is a need to stop immediately any activity that is in breach of section 33 and is causing or poses a significant risk of causing serious harm to human health or the environment you should consider the use of a stop notice (see paragraphs 4.4 – 4.14, above).

Interaction between EPR and EPA offences

- 6.10 For illegal waste operations either Section 33 EPA or Regulation 38 EPR could be used
- 6.11 If the incident is illegal dumping we will normally use section 33(1)(a) EPA.
- 6.12 If there is an established site which has some degree of permanence and ought to have a permit you should consider whether it is appropriate to use

section 33 EPA or regulation 38 EPR. If you consider it is appropriate to use a stop notice you will need to make that decision early in your investigation. Once you have committed to the use of a stop notice and have served it, you will not be able to then use regulation 38 EPR. You should discuss with your regional legal team which approach should be adopted at an early stage.

- 6.13 Section 33(1)(c) (treat, keeping or disposing in a manner likely to cause pollution or harm) is not dependent on there being a permit or exemption. Even if there is a permit and the conditions have been fully complied with but pollution or harm still results an offence under section 33(1)(c) may have been committed and it should be kept in mind when dealing with pollution incidents at regulated facilities where waste is involved. For water discharge activities or groundwater activities where there is no permit in place, offences generally should be pursued under regulation 38 EPR, though in limited cases it would be appropriate to consider using section 33(1)(c). You should consult your regional legal team if you are considering using section 33(1)(c). Where there is a permit in place section 33(1)(c) maybe of use if even if the conditions of the permit are complied with pollution still occurs. There is no equivalent provision to section 33(1)(c) under EPR.

Water discharge and groundwater activity offences

- 6.14 The offence in Regulation 38(1)(a) referring back to Regulation 12(1) in relation to water discharge and groundwater activities replicates the old section 85 WRA offences of causing or knowingly permitting the entry of polluting matter to controlled waters or causing or knowingly permitting trade or sewage effluent to be discharged into controlled waters and offences in Groundwater Regulations 2009.
- 6.15 The definition of “water discharge activity” mirrors the wording in the sections and offences in WRA which have been repealed. Likewise the definition of “groundwater activity” mirrors wording in Groundwater Regulations 2009.
- 6.16 Any water pollution offences that would have been previously prosecuted under section 85 should be prosecuted under Regulation 38(1)(a) and refer to Regulation 12(1)(b)
- 6.17 The meaning of “cause” and “knowingly permit” is the same as it was under WRA offences and the same case law that applied to those offences will continue to apply to EPR water discharge and groundwater offences e.g. the House of Lords case *Empress Cars* on meaning of “cause” will be applied to deciding whether a water discharge activity offence has been committed.
- 6.18 Likewise the terminology used in definition of water discharge activity and groundwater activity which has been carried over from predecessor legislation will continue to have same meaning as interpreted by the Courts e.g. “polluting”.

7. Remediation notices (EPR and EPA)

Regulation 57 EPR - power to prevent or remedy pollution

- 7.1 Regulation 57 EPR gives us a power to do works (or arrange for works to be done on our behalf) in two situations and to recover the costs of those works from the operator. The two situations are:
- a) if we consider that the operation of a regulated facility under a permit involves a risk of serious pollution, we may arrange for steps to be taken to remove that risk; and
 - b) if the commission of certain offences causes pollution, we may arrange for steps to be taken to remedy the effects of that pollution.
- 7.2 The offences that are relevant for (b) are operating without a permit; failure to comply with or contravention of a permit condition; and failure to comply with an enforcement, prohibition, suspension, mining waste facility closure notice or landfill closure notice. If you wish to exercise the power before obtaining a conviction, you should seek legal advice.
- 7.3 Note that it is not necessary where you are relying on one of those offences to show serious pollution, but you must show some pollution. For guidance on “pollution” and “serious pollution” see paragraphs 3.43-3.45 above on suspension notices.
- 7.4 In deciding whether it is appropriate to take action under regulation 57 you should consider the prospects of costs incurred by us being recovered from the operator, particularly where you are aware that the operator is in financial difficulty. Costs outstanding from the operator are normally recovered as a civil debt. Where an operator is in financial difficulty, there are implications for the continuation of any permit.

Sections 59 and 59ZA EPA – Notice to remove illegally deposited waste or eliminate or reduce the consequences of that deposit

- 7.5 Section 59 or 59ZA applies where waste (including extractive waste that has been deposited after 7 July 2009) has been deposited in contravention of section 33 (1) EPA or regulation 12 of the EPR. It is possible in limited circumstances that although at the time it was made the deposit appeared to be compliant with permit conditions the power to serve a section 59 or 59ZA notice might arise if the waste is subsequently held in breach of conditions or has been abandoned. In those circumstances you should seek legal advice on whether the power is available. The power is to serve a notice on the occupier (under s59) or owner (under s59ZA) of premises to remove the waste and / or to eliminate or reduce the consequences of its deposit but only if we reasonably consider that the occupier (under S59) or owner (under S59ZA) deposited, knowingly caused or knowingly permitted the deposit. We can require the person responsible for the deposit or for

allowing the deposit to undertake the works to remedy the illegal act rather than doing it ourselves. While you need admissible evidence that there has been a breach of section 33(1) EPA or regulation 12 EPR you do not need to have taken a successful prosecution for those offences before serving a notice.

- 7.7 Serving a notice on the owner under section 59ZA is not to be used simply instead of or as more convenient than serving a section 59 notice on the person in occupation of the land. It can only be used in accordance with S7.8 below

Grounds to serve a section 59ZA Notice

- 7.8 A section 59ZA notice can be served where:

- a) waste (including extractive waste) was deposited in contravention of section 33(1) EPA or Regulation 12 of the EPR and
 - i) there no occupier, or
 - ii) the occupier can not be found without unreasonable expense; or
- b) the owner and occupier are not the same person and a section 59 notice has been served on the occupier and has not been complied with; or
- c) the owner and occupier are not the same person, a section 59 notice has been served on the occupier and it has been quashed on appeal on the ground that the person served did not deposit, knowingly cause or knowingly permit the deposit.

- 7.9 If there is an occupier (who can be found without unreasonable expense) a notice can only be served on the occupier and not on the owner (unless they are the same person). If we do serve a notice and it is not complied with or has successfully appeals on the basis that the occupier did not deposit or knowingly cause or knowingly permit the deposit, then we can consider serving a notice on the owner but only if we have admissible evidence that he deposited or knowingly caused or knowingly permitted the deposit.

Meaning of owner and occupier

- 7.10 A notice has to be served on the person who is the occupier or owner at the time the notice is served and not on the person who was the occupier or owner at the time the waste was deposited.

- 7.11 Occupier is not defined in the legislation, but, taking into account the provisions of EPR and their purpose, should be taken to be either the person in actual physical occupation or, if no one is in occupation, the person entitled to occupy (other than the owner). This is a more restrictive approach than we have taken in the past. Before the introduction of section 59ZA we took the view that if there is no one in actual occupation, the owner would be the person entitled to occupy, including the freehold owner. That approach can not be justified now that express provision and safeguards have been made for service of notices on owners who are not in actual occupation.

- 7.12 Persons in actual occupation would include those unlawfully occupying the site. In most cases, it will be apparent that a person is occupying a site but in a minority of cases this may not be clear and in such cases legal advice should be sought.
- 7.13 Owner is defined, in relation to England and Wales, as a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land or where the land is not let, would be so entitled if it were so let.
- 7.14 The definition of “rack rent” in relation to property, means a rent that is not less than two-thirds of the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and deducting from it the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain the property in a state to command such rent.
- 7.15 This could include a lessee who has the ability to underlet his property, as although they would not own the freehold of the property they could receive rent on it (as required by the definition). This therefore brings within the definition of owner any lessees who do not have an agreement restricting their right to underlet the property, because to be defined as the owner all they need is the ability to receive rent if they let the property.
- 7.16 In terms of gathering information as to owner and or occupier, you should consider making a Land Registry Search, which will show the freehold owner and most long leases (where the right to sublet is usual) where the title to the property is registered or using Section 71 of the EPA (see below) to obtain information.

Appeals

- 7.17 If an appeal is made the notice has no effect until the appeal has been determined.
- 7.18 It is important to realise that appeals in relation to section 59 and 59ZA notices are unlike the usual form of appeals from notices we serve. They are civil proceedings in the Magistrates’ Court. That means that they will be dealt with by calling live witnesses who will face cross examination, there being no provision for these appeals to be dealt with in writing only. In addition, costs will usually be awarded to the party that succeeds on the appeal. If costs are awarded against us, they will have to come from the Area’s budget. In a contested hearing the other party’s costs can easily amount to several thousand pounds. It is therefore vital to be aware of and consider the grounds of possible appeal, and take legal advice, before serving a notice.
- 7.19 A court hearing an appeal will have to quash the notice if satisfied, on the balance of probabilities, that the person served with the notice neither deposited, knowingly permitted or knowingly caused the deposit of waste.

- 7.20 A court would also have to quash a notice if the notice has a material defect. Examples of this will be getting the name of the person served wrong / the wrong entity such as a trading name, not allowing 21 clear days or serving a section 59 notice where a section 59ZA notice should be served.
- 7.21 In the case of a notice served under section 59ZA there is an additional ground of appeal, namely that in order to comply with the requirement the appellant would be required to enter the land unlawfully.
- 7.22 For both section 59 and 59ZA notices the court has discretion to modify the notice for e.g. extend the time allowed to comply with it. It is important to realise that even if the notice is only modified rather than quashed the appeal will have been successful in terms of costs.
- 7.23 In an attempt to reduce the risk of a successful appeal and to ensure the notice is effective, the following should be considered
- a) you must state all waste types which you require to be moved – do not name the source as there is no need to do so and it is unlikely that you can be sure that all the waste came from that source. It opens the possibility of a debate there is no need to have;
 - b) for section 59 and 59ZA (1) & (2) you must ensure that the waste was deposited in contravention of section 33(1) EPA or regulation 12 EPR. This therefore does not include wastes lawfully deposited at a site where a permit is later revoked. Regulation 23 should be used to get that waste removed and any remediation carried out if that is needed;
 - c) unless the land on which the waste is deposited is very easy to identify by address alone, refer to a plan (not 'map') with the site indicated as outlined in colour;
 - d) you must give at least 21 clear days for compliance (about 24 in practice) but you also have to give such extra time as is reasonable. What you think is a reasonable time may not be the same as a Court considers on appeal having heard representations from the person served. Therefore recognise that there is likely to be a band of time that is reasonable and put a date for compliance that is towards the end of it.
 - e) You must ensure that you have sufficient admissible evidence that the person to be served with the notice deposited or knowingly permitted the deposit of controlled waste. This may require you to carry out an interview under caution unless you have clear and compelling evidence without doing so. The interview should be conducted on the basis that you suspect there has been a breach of section 33 or regulation 12 as the case may be. This does not mean that a section 33 or regulation 38 offence needs to be successfully prosecuted before you serve a notice. There is no offence under section 59 unless a notice is not complied with, so you will only be able to gather evidence of that offence once the time for complying with the notice has expired.

Withdrawal / Extension of Notices

- 7.24 There is no power to withdraw or extend a section 59 or 59ZA notice. If we consider that a notice has been served, which should not have been or should not have been in the form it has, all we can do is to say that we would not enforce it and, if appropriate, serve a new notice.

Failure to comply with a section 59 or 59ZA Notice

- 7.25 If there is no appeal and the notice is effective, failure to comply with it is an offence. You should be aware that this is a summary only offence and proceedings must be commenced within 6 months of the failure to comply with the notice.

Legal Advice

- 7.26 If you are thinking about serving a section 59 or 59ZA Notice you should consult your Regional legal team before serving the notice and address with them the following:
- a) Is the person to be served a legal entity, i.e. an individual or a company (as with all notices) – see guidance in notice handbook.
 - b)
 - i) What evidence do you have that the person you wish to serve is actually occupying the site or is the person entitled to occupy (other than the owner) or
 - ii) Why do you consider that there is power to serve a notice under section 59ZA and what evidence do you have that the person you wish to serve is an owner of the site?
 - c) What evidence do you have that the waste was deposited in contravention of section 33(1) or Regulation 12? Note a prosecution is not necessary to prove this, although having admissible evidence is.
 - d) Have you ensured that all waste types are included, describe the waste by its type not its source?
 - e) Have you described the site where the waste is deposited with sufficient clarity? If there is any doubt refer to a plan with the site outlined in colour.
 - f) Have you given sufficient time – which must be both at least 21 clear days and a reasonable time? Why do you think the time given is reasonable?
 - g) What evidence do you have that the person to be served is the occupier or landowner and whether they deposited the waste, knowingly caused or knowingly permitted the deposit?
 - h) If you have required steps to be taken to reduce or eliminate the effect of the deposit – have you considered alternative less onerous measures? Why do you consider the measures asked are reasonable?

Interaction between EPR and EPA remediation powers

- 7.27 There is an obvious potential overlap between regulation 57 EPR and section 59 EPA although S59s enable us to require others to do the work if it involves the illegal deposit of waste. There is also an overlap between section 59 and Regulation 36 enforcement notices. There is nothing in section 59 or 59ZA that prevents their use at permitted facilities. So, you might have a situation where waste was delivered to a site not permitted to accept it or too much waste has been stored at a permitted site. In those cases a number of enforcement powers under EPR are available but section 59 might also be capable of use in those situations. In those cases it is more appropriate to use the enforcement powers for the regime regulating the facility and generally you should look to use EPR enforcement powers at regulated facilities before considering section 59.
- 7.28 The appeal mechanism under section 59, the difficulty in establishing that an operator of a site has breached section 33 or regulation 12, when what they have in fact done is breach the conditions of their permit, and the prescriptive nature of what has to be established to withstand an appeal under section 59 compared to the generally speaking bare powers given under EPR are all strong factors in using the enforcement options under EPR before considering section 59 at a permitted site.
- 7.29 Section 59 and 59ZA continue to be very useful for illegal waste sites or waste incidents that are not covered by a permit as there is no provision in EPR that apply to non-permitted sites.

Sections 161A WRA 1991 – Notice to prevent or remedy pollution of controlled waters

- 7.30 Under section 161A of the Water Resources Act 1991, we have the power to issue a works notice requiring a “responsible person” to carry out specified works or operations, where it appears to us that:
- (a) any poisonous, noxious or polluting matter or any waste matter is present in any controlled waters; or
 - (b) any controlled waters are being or have been harmed or are likely to be harmed by any event, process or other source of potential harm.
- 7.31 A works notice could require works to remove or abate polluting matter.
- 7.32 There are specific requirements for works notices in terms of their content and the procedure including the requirement to reasonably endeavour to consult the responsible person concerning the works before serving the notice. There is a right of appeal against any works notice.

7.33 Failing to comply with a works notice is an offence.