

THE IPPC DIRECTIVE: UK LAW AND PRACTICE

Introduction

1. There are two senses described here in which environmental regulation may be integrated. The first of these – substantive integration – aims to consider environmental impacts holistically. This can be at a very broad level – for example, forms of ecosystem management or strategically assessing plans and programmes – or it can be at a more site-specific level, whereby, from any given installation, controls on emissions to individual media (air, water, land) are replaced with an integrated system of control over all environmental impact. This latter approach to substantive integration is reflected in the system known as integrated prevention pollution and control (IPPC).
2. The second sense in which integration can be used is to describe processes through which the bureaucracy of environmental regulation is consolidated. This can involve institutional integration, such as the creation of relatively unified regulatory agencies such as the Environment Agency. This is usually justified on grounds of greater environmental coherence. But integration can also involve streamlining or unifying the rules that govern control of harmful impacts; this sense of integration is prompted more by notions of “better regulation”, and includes the idea of easing the burden on the regulated through simplifying and standardising the rules.
3. The Environmental Permitting (England and Wales) Regulations 2007 mark a decisive point in trying to integrate UK environmental law in the second sense. The Regulations aim to provide, as far as possible, a unified permitting system covering a number of areas in which EC environmental law must be given effect to, the main ones being IPPC and waste management. The Regulations make it possible to issue standard permits with “off-the-shelf” conditions as well as tailored permits in more complex cases. They mean that, in general, the same procedural rules (about

applying, transferring, appealing, enforcing, public participation, etc) apply across the board to all permits issued under the Regulations.

4. IPPC derives originally from European Directive 96/61/EC (with subsequent consolidation in 2008/1/EC, which, in turn, which was based upon the UK system of integrated pollution control found in the Environmental Protection Act (EPA) 1990. The IPPC Directive takes a flexible approach to regulation, and is based upon member states applying broad principles and procedures rather than specific numerical standards.
5. An environmental permit based upon IPPC utilises the Best Available Techniques (BAT), a flexible process standard, which takes into account local circumstances and balances costs against environmental benefits. Emissions limit value (ELV) standards are then set by reference to the BAT for a particular installation. Environmental quality standards are taken into account in setting ELVs above those related to BAT if the quality standards represent national or European standards, or if local conditions require it.
6. IPPC applies only to activities carried out at the most polluting industrial installations. The vast majority of these installations are controlled by the Environment Agency, with a small residual number controlled by local authorities. IPPC applies to both new and existing installations.
7. The strengths of IPPC include the way in which it promotes technological innovation in an economically efficient manner, encourages the regulation of industrial sources by considering all environmental impacts as a whole, shifts the focus of industrial pollution control from end-of-pipe solutions to clean technology, and the practical workings of the idea of ecological modernisation.
8. The weaknesses of IPPC might be said to include: the relatively small scope of application; the bias in favour of technological solutions that exclude greater public

participation; the promotion of weaker forms of “sustainable development” that do nothing to address underlying issues of resource depletion and over-consumption; and the lack of true integration of controls over all sources of pollution.

Part 1: General questions about the implementation and application of the IPPC – Directive and the role of the Courts

(1) Question: How many IPPC – plants are there in your country?

Answer: Approximately 4,000

(2) Question: In what way are questions concerning the application of the IPPC – Directive brought to court?

Answer: The two usual ways are by judicial review of the decision by the Environment Agency or local authority to grant a permit: Edwards v. Environment Agency [2007] Env LR 9; of a variation of a permit: Levy v. Environment Agency [2003] Env LR 11; of a refusal to grant a permit: R v. Secretary of State for the Environment and RJC Compton and Sons ex parte West Wiltshire District Council [1996] Env LR 312 and of a revocation notice of a permit: R v. Environment Agency ex parte Petrus Oils Limited [1999] Env LR 732. The second way is by way of criminal prosecution. The Environmental Permitting (England and Wales) Regulations 2007 (SI 2007/3538) provide a long list of offences in relation to the Environmental Permitting system: regulation 38. The most serious of these relate to operational breaches such as operating a regulated facility without a permit or in breach of permit conditions, and failing to comply with a statutory notice.

Less serious offences are committed in relation to providing false information. All of these offences are punishable in the Magistrates' Court, with a maximum fine of £50,000 or imprisonment for a term of up to 12 months in a case with the most serious offences, and £5,000 or imprisonment up to a maximum of 2 years for the lesser two categories. The more serious categories of offence are also triable in the Crown Court, with an unlimited fine and/or imprisonment for a term of up to 5 years. It is open to any court, in sentencing an offender for failure to comply with an enforcement or suspension notice, to order that the effects of the offence be remedied: regulation 44. This allows for clean-up and compensation costs to come directly out of the offender's pocket. In many instances, these costs will far outstrip any reasonable fine that could be imposed. There are further remedies available to the regulatory agency in the High Court. The regulator can seek an injunction in cases in which the enforcement of the criminal law is not securing adequate compliance: regulation 42. It must, however, exhaust other remedies before seeking an injunction: Tameside Metropolitan Borough Council v. Smith Brothers (Hyde) Limited [1996] Env LR 312.

- (3) Question: Which authority (authorities) issues permits according to the IPPC – Directive? How far has the integration according to the Directive reached? Can, in your country, one authority issue an IPPC permit comprising the total environmental impact of the polluting activity (water, air, land, waste etc) or does the

company (the applicant) have to send applications to different authorities?

Answer: The primary responsibility for regulating the Environmental Permitting process lies with the Environment Agency, although local authorities have residual responsibilities: regulation 32. The Environment Agency regulates Part A (1) installations and mobile plant as well as waste operations. Local authorities regulate Part A (2) and B installations, and mobile plant and waste operations that are associated with such installations. It is possible (but rare) for there to be a number of activities on site that make up more than one regulated facility – particularly if a waste operation is part of a Part A (2) or B installation. In such circumstances the Secretary of State has the power to issue a direction, or the operator has the power to make a written request for such a direction, so as to allocate regulatory responsibility to the regulator of the major activity of the site. In such cases there may be one regulator and more than one permit that applies to a single site.

(4) Question: Which authority or court hears appeals against IPPC – permits? What competence does the authority or court have to change/amend a permit? Can it for example decide about new or changed conditions? Can it just withdraw the permit or parts of the permit?

Answer: There is a right of appeal to the regulatory agency against the refusal to grant or vary a permit, against revocation, variation, enforcement and suspension notices, and against the imposition of unreasonable conditions upon a permit:

regulation 31. Furthermore, there is a right of appeal in cases in which the regulatory agency has notified an operator that information contained within a permit, or application for permit, is not commercially confidential: regulation 53.

Generally the time limit for appeals (see Schedule 6) is similar to that in the planning system, being six months from the date of refusal or deemed refusal to grant permits. In cases in which there is an appeal against an enforcement, suspension, or variation notice, the time limit is two months from the date of the notice. If the regulatory agency is seeking to revoke a permit, the appeal must be made before the date on which the notice takes effect. Finally, in cases in which there is an appeal concerning commercial confidentiality, it must be submitted within 20 working days from the date of the refusal.

A revocation notice will not take effect pending the hearing of an appeal: regulation 31 (9). In all other cases – that is, surrender, enforcement, suspension or variation – there is no suspension of the notice pending an appeal: regulation 31 (8). Thus an operator cannot, if there is a rush order, gain an economic advantage by appealing against a notice so as to stop the enforcement process, continuing to pollute until the order is completed, and then stopping the process before the appeal is heard. An appeal must be made in writing to the Secretary of State. The appeal has to be accompanied by any relevant information, including any application, permit, correspondence, or decision, and a statement as to how the appellant wishes the appeal to be determined.

An appeal can be heard in one of two ways: either by written representations or by a hearing. If either party to the appeal requests that it be heard by hearing, the Secretary of State must hold a hearing, although there is discretion as to whether the hearing is held in public. The Secretary of State also has a power to direct that hearing be held.

- (5) Question: Who – in addition to the operator of the plant – can bring a case concerning IPPC – matters to a court by appealing against an IPPC – permit? What about for example people living in the neighbourhood, NGOs and authorities on different administrative levels (local, regional and national)? What kind of obstacles are there for them to bring a case to court: for example different kinds of procedural costs?

Answer: The right of appeal is limited to the operator. Challenge by third parties must be by way of judicial review in the Administrative Division of the High Court on conventional judicial review grounds. This applies whether the third party is an individual or the Government or indeed whether local or national government. The law and practice of judicial review is far too complicated to set out in a paper of this kind. Reference is made to S.A. de Smith's *Judicial Review of Administrative Action* edited by Lord Woolf and Professor Jeffrey Jowell (6th edition 2007 London Sweet and Maxwell); *Judicial Review Handbook* by Michael Fordham QC (5th edition 2008 Hart Publishing Oxford); *Judicial Remedies in Public Law* by Clive Lewis QC (4th edition 2008 Sweet and Maxwell London). The law on costs is evolving but the normal rule is that the loser pays the winner's costs. There are provisions for

cost capping which limit the amount a successful party can recover as well as for a protective costs order whereby the loser (normally an NGO) will not pay the winner's costs. For recent discussion see the report of Mr Justice Sullivan: Ensuring access to environmental justice in England and Wales (May 2008).

(6) Question: On what basis is decided what is considered to be the best available technique (BAT) in a certain case? What is the role of the BREF documents?

Answer: The terms in the Directive are vague, which allows the regulatory agency some discretion in determining applications on a case-by-case basis. There is, however, some supplementary guidance to be found in sector guidance notes and BREF documents. The guidance notes provide a coherent context in which the decisions can be made in relation to permit conditions. The national statutory guidance notes are based on the BREF documents. The IPPC notes are non-prescriptive, providing indicative standards for both new and existing installations, with clear guidelines for upgrading in the case of existing plant. Each application is considered individually and variations from the guidance notes standard may be acceptable in certain circumstances.

(7) Question: Is there a time limit for the IPPC – permit, or is the permit valid forever? Is the permit holder obliged to apply for a new permit after a certain time period? Can a supervisory authority issue injunctions which go further than the conditions of the permit as regards environmental matters? Under what circumstances

can a supervisory authority request a review of the permit and its conditions?

Answer: In granting an application, the regulator can attach any conditions to the permit that it sees fit including a time limit. The regulator is also under a duty to review permits periodically: regulation 34. Such reviews are required to ensure that the permit conditions are up to date and capture changes in circumstances, such as environmental impacts, available techniques, or other relevant issues, such as Community-wide emission limit values (ELVs). There is no prescribed period within which reviews must be undertaken and the only guidance is that the Environment Agency will carry out reviews “having regard to its experience of regulating various sectors”: DEFRA: Environmental Permitting Core Guidance paragraph 10.33 (2008) available on-line at www.defra.gov.uk/environment/epp/documents/core-guidance.pdf. This review process is a key factor in ensuring the efficiency of a technology-forcing process standard such as BAT.

(8) Question: Is the choice of the localisation of an IPPC plant considered in the same process as the IPPC – permit and the condition for the permit? Or is the localisation decided in a separate process according to another legislation? In that case: which comes first, the decision on the localisation or the IPPC – permit?

Answer: Locational issues may form part of an IPPC permit determination (for example if emissions have adverse environmental impacts due to the particular location) but the

primary consideration of locational issues will take place as part of the planning system. Planning consent will normally be sought first, but this is only a requirement in relation to certain waste operations such as landfills.

- (9) Question: Are the EIA – Directive and IPPC – Directive implemented in the same legislation in your country, so that you in one single process get a permit that fulfils the demands of those directives? If not so: how is the EIA – Directive implemented? For example in special legislation, in planning and building legislation or otherwise?

Answer: The two systems are separate. Many of the installations that require a permit to operate will also be subject to the need for environmental assessment under the relevant legislation. In these cases, much of the information included within an environmental statement would form the basis of the information submitted with a IPPC application. The IPPC Directive and the EIA Directive allow for information produced for the purposes of one Directive to be recycled for the purposes of the other. In practice, therefore, it would be appropriate to submit an environmental statement with both applications, although the IPPC application would need to concentrate on additional technical matters, such as ELVs and BAT. The Environmental Permitting Regulations in relation to the grant or variation of a permit, provide that information obtained under EIA must be taken into account: Schedules 4 and 7.

(10) Question: Suppose an existing IPPC – plant wants to double its production and that this will be done by duplicating most of the process equipment. The plant will thus consist of an old and a new line of production, but some equipment that is necessary for environment protection will be parted so that it is used by both lines. The application concerns only the increase of production (the new line) and not the whole production (both old and new line). How does the permit authority handle this situation? Does it issue a permit concerning only the increased production (the new line) or does it demand a new application concerning the whole production (old and new line)? Or what?

Answer: This would be dealt with by an application by the operator for a variation of the existing licence. The regulator may vary permit conditions at any time: regulation 20. The variation procedure requires consultation and publicity both in cases in which the change is “significant” and at the discretion of the regulator: Schedule 5, paragraph 5 (2).

(11) Question: Can the permit authority decide on conditions based on BAT, even if the application only describes environmental protection measures that are less strict. How does the authority handle applications that are not based on BAT?

Answer: Operators must use the BAT standard in order to achieve a high level of protection for the environment. The application of the BAT principle is made in the context of local conditions, which include such things as the local environment and economic factors. Emissions limit values are then set by

reference to both BAT and local conditions. Environmental quality standards (EQSs) are considered once the ELVs have been set. In circumstances under which an EQS set under European or national standards would be breached, it is possible to set conditions that are stricter than BAT or to refuse the permit: Article 10. The achievement of these standards is achieved through the other Directives listed in the Environmental Permitting Regulations. In this sense, EQSs represent a minimum threshold for the imposition of ELVs, with BAT meeting a higher standard of prevention and/or reduction over and above the EQS. The Court of Appeal has considered the relationship between BAT, EQSs, ELVs and the imposition of conditions on an IPPC permit in R. (Rockware Glass Limited) v. Chester County Council [2007] Env LR 3.

(12) Question: If there are national general rules on emission standards that do not match BAT, how are they applied by the permit authority?

Answer: The short answer is in the UK they must match one another.

(13) Question: How do existing industries meet the demands of the IPPC – Directive in your country? Who has the responsibility to make sure that the requirements are met? Is the supervisory authority, the operator of the plant or someone else? What are the consequences if an existing industry does not meet the requirements? Can it be closed? Or is a certain time period accepted before measures? How long?

Answer: All pre-existing waste management licences and PPC permits were automatically transferred into environmental permits on 6

April 2008: Regulation 69 (1), (2) and 70. Registered waste exemptions were also transferred automatically to exempt waste operations on that date. All outstanding applications for waste management licences or PPC permits will become environmental permits on the day that they are determined: Regulation 70. This includes all applications to vary, modify, or surrender an existing licence or permit: Ibid. Any other operator of a new regulated facility is required to obtain an environmental permit, or a waste exemption, before it can commence operations: Regulation 12. Any appeals will be determined under the system in force at the date the appeal was lodged. Thus any appeals before April 2008 will be determined under the PPC/waste management licensing regime: Regulation 72 (1) (c).

(14) Question: Which authority is supervising IPPC – plants? How often do inspections take place? What enforcement policy do they have (warnings, injunctions, sanctions and so on)? Which type of sanction can be applied in case of violations?

Answer: The supervisory authorities are the Environment Agency and local authorities. There is no available information as to the regularity of inspections save as a matter of law the regulator is under a duty to review permits periodically: Regulation 34. There is no prescribed period within which reviews must be undertaken; the only guidance is that the Environment Agency will carry out reviews “having regard to its experience of regulating various sectors”: DEFRA: Environmental Permitting Core Guidance paragraph 10.33 (2008).

Part 2: an example

A new tannery is going to be built in your country. The tannery will have a production that exceeds 12 tonnes per day and is thus an IPPC – plant.

(1) Question: What kind of authority or authorities (local, regional, central) will handle (examine, review) the application and issue the permit?

Answer: The Environment Agency.

(2) Question: Will the application include an EIS according to the EIA Directive?

Answer: If the tannery is a new tannery (which it is) it will require planning permission from the local planning authority before it can be built. The environmental assessment will be sent to the planning authority and forms part of the planning application.

(3) Question: Will the permit authority/authorities try the localisation of the plant in the same process as the IPPC – questions?

Answer: See the Answer to Question 8 under Part 1 above.

(4) Question: Are there any procedural costs for the tannery operator?

Answer: There are prescribed fees.

- (5) Question: Does the permit authority normally ask other authorities on different administrative levels in the permit process their opinion on the application?
- Answer: There may be consultation with the relevant local authority.
- (6) Question: How does the permit authority ensure public participation? Can for example people state their view in writing, by e-mail, in a public hearing or otherwise?
- Answer: There are extensive provisions for public participation in the application procedure: Schedule 5. There are no prescribed methods for public consultation. Any can be used.
- (7) Question: The permitting authority will issue the permit on certain conditions?
- Answer: The Environmental Permitting Regulations require the regulator to exercise it's relevant functions (including the decision on whether or not to grant a permit and if so, subject to what conditions), so as to ensure compliance with the objectives and requirements of the IPPC Directive, for example that emission limit values must be set, based on BAT.
- (8) Question: If the permit authority wants to prescribe a condition on the maximum discharge of chromium to water from the tannery, on what basis is the level of the discharge decided?

Answer: In accordance with the IPPC Directive, an emission limit value would be set, based on BAT for the installation.

(9) Question: Who can appeal the permit and to whom?

Answer: See the Answer to Questions 4 and 5 under Part 1 above.

Lord Justice Robert Carnwath

Judge William Birtles

Note. We gratefully acknowledge the assistance of Stuart Bell and Donald McGillivray: Environmental Law (4th Edition 2008).