Re: Sewage discharges and Local Planning Authorities

O P I N I O N

Introduction

1. I am asked to advise the Environmental Law Foundation on the extent to which Local Planning Authorities ("LPAs") are entitled to independently assess the likely cumulative impacts on the sewerage network of new proposed developments, and in particular the extent to which they can take a contrary view to the relevant sewerage undertaker.

2. In summary, case law and policy are both eminently clear that there is nothing in law or planning policy requiring LPAs to defer to sewerage undertakers. LPAs are perfectly entitled to form their own view of likely cumulative impacts on the sewerage system based on the available evidence. Indeed, the revised National Planning Policy Framework (July 2021) ("NPPF") explicitly allows for this.

Factual background

3. This advice is requested in the context of significant sewage spill incidents throughout England and Wales. A number of LPAs are considering the extent to which they can take into account cumulative sewage impacts for the purposes of granting planning permission.

Applicable policy

4. Paragraph 188 of the revised NPPF notes that:

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

5. Paragraph 188 is not however the only provision of the NPPF that deals with pollution, and would be a mistake to consider this provision in a vacuum. In particular, paragraph 188 is qualified by the following provisions of the NPPF:

   (i) Paragraph 174 notes that planning decisions should contribute to and enhance the natural and local environment by, *inter alia*, *"preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution or land instability"* and *"wherever possible, help[ing] to improve local environmental conditions such as air and water quality, taking into account relevant information such as river basin management plans"* (emphasis added);

   (ii) Paragraph 185 notes that:

   > "Planning policies and decisions should also ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development";

   (iii) Paragraph 186 provides that *"Planning policies and decisions should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants*, *taking into account the presence of Air Quality Management Areas and Clean Air Zones, and the cumulative impacts from individual sites in local areas"* (emphasis added).

6. Planning Practice Guidance on Waste also notes the following (emphasis added):

   > "What is the relationship between planning and other regulatory regimes?
   >
   > The planning system controls the development and use of land in the public interest. This includes consideration of the impacts on the local environment and amenity taking into account the criteria set out in Appendix B to National planning policy for waste.
   >
   > There exist a number of issues which are covered by other regulatory regimes and waste planning authorities should assume that these regimes will operate effectively. The focus of the planning system should be on whether the development itself is an acceptable use of the land and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under other regimes. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body.

Paragraph: 050 Reference ID: 28-050-20141016 Revision date: 16 10 2014"

Legal principles

7. The leading case on the overlap between planning and pollution control is *Gateshead MBC v Secretary of State for the Environment* [1995] J.P.L. 432. In this case, the Court of Appeal upheld a decision by the Secretary of State to grant planning permission for an incinerator on the basis that the pollution regulator would determine appropriate limits for emissions and that there would be no unacceptable environmental impact as a result.

8. However, what the Court of Appeal did *not* say was that the Secretary of State would *not* have been entitled to consider emissions at all, in light of an overlapping regulatory regime. Glidewell LJ noted at 43 (emphasis added):

> "Mr Mole submits, and I agree, that the extent to which discharges from a proposed plan will necessarily or probably pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission."

9. The approach in these cases has subsequently followed in a number of other cases, including *R v Bolton MBC, Ex p. Kirkman* [1998] Env. L.R. 719, *R (Bailey) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1257 (Admin), and *Hopkins Developments v First Secretary of State* [2006] EWHC 2823 (Admin).

10. It is important to note that in each of these cases, it was held that while a planning authority was entitled to rely on overlapping pollution controls, it is not *required* to do so and could make its own assessment. Thus in *Hopkins*, a site promotor unsuccessfully challenged the refusal of permission for a concrete batching plant, on the basis that the necessary environmental permit would have ensured that the plant was operated in a way which led to no significant pollution. The High Court dismissed the appeal, because:

> "…in appropriate cases planning authorities can leave pollution control to pollution control authorities, but they are not obliged as a matter of law to do so" [11] (emphasis added).

11. The judge explained in more detail at [14]-[15] (emphasis added):

> "The alternative way in which Mr Wadsley puts his case in relation to dust is to say that, in view of the existence of the pollution control regime, the conclusion that dust would cause serious harm to the amenities was *Wednesbury* unreasonable. Under the 2000

> Regulations the council in issuing a permit would have to impose conditions to ensure that the plant was operated in such a way that no significant pollution was caused; and pollution includes emissions which impair or interfere with amenities. It was therefore not open to the inspector to conclude, assuming, as he had to assume, that the pollution control regime would be properly applied and enforced, that dust emissions from the plant would or might seriously impair the amenities of the area.
>
> 15. This is an argument that is superficially attractive. But it is dependent on the underlying assumption that, in relation to the likely impact of pollutants to which the 2000 Regulations apply, primacy must be accorded to the judgment of the regulator above that of the planning authority. I can see no basis for such an assumption…"

12. *Hopkins* was followed in *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin), where it was held that a planning decision-maker was entitled to reach its own view on the effects of a development and that it was open to an inspector to conclude that the use of the land would cause problems for local residents, notwithstanding the grant of an environmental permit.

13. While it is true that this line of cases pre-dated the present NPPF, as is noted in Burnett-Hall on Environmental Law (3rd edition 2012) at 7-129:

> "The NPPF largely replicates the approach taken in the former PPS10 and PPS23 of requiring planning authorities to focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions which are subject to approval under pollution control regimes, which regimes should be assumed to operate effectively."

14. In that regard, I note that para 122 of the 2012 NPPF (which Burnett-Hall refers to) largely replicates para 188 of the 2021 NPFF.[1]

15. Thus I do not consider there to be any reason why the line of case law referred to above does not remain good law. The applicable planning guidance considered in those cases is materially the same as the present NPPF.

16. Moreover, these legal principles were more recently endorsed by the Court of Appeal in *Gladman Developments v SSCLG* [2019] EWCA Civ 1543, where the Court upheld a decision of a planning inspector to refuse permission for two developments on the basis of their impact on air quality, notwithstanding the existence of the Air Quality Standards

[1] Para 122 of the 2012 NPPF: "local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively."

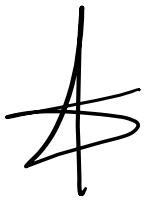
Regulations 2010 and the NPPF requirement to assume that pollution control regimes will operate effectively.

Analysis

17. In light of the above planning guidance and case law, I am firmly of the view that an LPA is perfectly entitled to form its own view of a given development's impacts on the sewerage network, on the basis of the information put before it. In general, an LPA can also properly take into account cumulative pollution impacts for the purposes of granting planning permission.

18. While an LPA would, in most cases, be entitled to defer to a sewerage undertaker on these kinds of questions, it is by no means required to do so. In circumstances where a sewerage undertaker indicates that it does not have any concerns about the impacts of a proposed development, cumulative or otherwise, it is simply not the case (as a matter of law or policy) that the LPA must defer to the sewerage undertaker on that question.

19. Do not hesitate to contact me if I can be of further assistance.



ALEX SHATTOCK
Landmark Chambers
ashattock@landmarkchambers.co.uk

24.1.22