



# Noise nuisance from windfarms - Prevention is better than cure

Presenting to: Environmental Protection UK  
09 September 2010

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## What is nuisance?

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Noise nuisance depends on the circumstances, notably on the effects that the noise has on humans and the use of property. Nuisance has been defined as '*a condition or activity which unduly interferes with the use or enjoyment of land*'. This definition is drawn from private nuisance. This form of nuisance is a tort, or civil wrong, which provides a right to owners of property to use it free from *unreasonable* interferences from neighbouring property. The standard required to prove that the interference is unreasonable is a high one, so minor problems or mere annoyance will not be enough to amount to a nuisance in law.

*Ref: Clerk & Lindsell on Torts, 19th ed, (Sweet & Maxwell: 2006) ch. 20.*



## What is nuisance - statutory nuisance?

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Noise nuisances also controlled by the statutory nuisance regime, under Part 3 of the Environmental Protection Act 1990 (EPA). Section 79(1)(g) of the Act provides that: 'noise emitted from premises and being prejudicial to health or a nuisance' shall constitute a statutory nuisance. There is a two-limbed structure to the provision: either prejudicial to health *or* a nuisance.

The basic structure of the statutory nuisance regime is that it requires a local authority to serve an abatement notice on the person or persons responsible for the nuisance where it is satisfied that a statutory nuisance exists in its area, or is likely to occur or recur (*Environmental Protection Act 1990, s.80(1).* )

Failure to conform to the requirements of the notice is a criminal offence. A private prosecution can also be brought by a 'person aggrieved' by the statutory nuisance and the court has the power to make an abatement order under section 82 of the EPA.



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### In *Stone v Bolton* [1949]:

“Whether such an act does constitute a nuisance *must* be determined:-

*not merely* by an abstract consideration of the act itself,

but by reference to *all the circumstances of the particular case*, including, *for example*:

- **the time** of the commission of the act complained of
- **the place** of its commission
- **the manner of committing** it, that is, whether it is done **wantonly** or in the **reasonable exercise of rights**
- **the effect of its commission**, that is, whether those effects are transitory or permanent, occasional or continuous



## Best Practicable Means

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BPM essentially balances needs of industry with interests of residents.

Enough to show BPM adequate to 'prevent, or to counteract the effects of, the nuisance'



## Noise nuisance and the planning system

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A key issue in windfarm development is whether the grant of the permission authorizes any nuisances arising from the development, assuming that it keeps within the scope of the permission.

In *Allen v Gulf Oil Refinery Ltd* the Court of Appeal affirmed two fundamental principles:

- (1) a planning authority has no jurisdiction to authorize a nuisance; and
- (2) the grant of planning permission can permit the change of character of a neighbourhood.

The *Gulf Oil* case establishes that where the scale and type of new development allowed by planning permission inevitably results in common law nuisance, which could not reasonably be avoided, then there can be no cause of action. This does not mean that the planning authority can authorize any nuisance, though, in effect, it can alter the neighbourhood standard against which one person's interference with his neighbour's use of land could be judged a nuisance.



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## **Gillingham BC v Medway Dock Co Ltd [1993] QB 343.**

In *Gillingham BC v Medway Dock Co Ltd* the redevelopment of Chatham Dock changed the whole character of the neighbourhood. Planning permission set a high threshold for disturbance; such that the scale of the change resulting from the grant of planning permission meant that claims in nuisance based on the previous standard could not be sustained.

The two principles cited in the *Gulf Oil* case were reconciled by Buckley J in *Gillingham* thus:

*“In short, where planning consent is given for a development or change of use, the question of nuisance will thereafter fall to be decided by reference to a neighbourhood with that development or use and not as it was previously.”*



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## ***Wheeler v JJ Saunders Ltd 1996 Ch19***

*Wheeler v JJ Saunders Ltd* added refinement on the question of scale. *Wheeler* did not involve change in the whole character of a neighbourhood, even though the defendants had argued that there had been an intensification in the use of the land. The facts of this case were that a nuisance resulting from the housing of 800 pigs within a distance of 36 feet of the plaintiff's holiday cottages caused a substantial interference in the enjoyment of that land. The extension of the pig farm did not amount to an intensification of use significant enough to indicate a change in the character of the neighbourhood.

In addition to the difficulties associated with the case law, BPM provides a statutory defence. It can be raised at two stages: when appealing against the service of an abatement notice or as a defence in a prosecution brought for breach of the notice.



## Constraints associated with nuisance provisions

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If a development has gone through a rigorous planning process and is keeping within any controls imposed as a result, it is quite likely that a BPM defence will be available. When this is considered alongside the difficulties associated with the case law, it can be seen that it would be difficult to take nuisance action for a major windfarm development where a *Gillingham* or *BPM* defence would be likely to succeed, especially if the development satisfies the requirements of any planning conditions or other controls imposed as part of the permitting process.

This does not mean that nuisance action can be ruled out. For example, it is conceivable that nuisance action could be taken successfully if the developer failed to assess the impacts properly and underestimated the scale of the impacts.

However, opportunities to take nuisance action are likely to be significantly constrained. So the main conclusion is:

**PREVENTION IS BETTER THAN CURE**



## Preventing noise nuisance

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Noise nuisances can be effectively prevented using provisions available under the EIA and planning regimes

However, it is often the case that these provisions are not used effectively. Possibly one of the reasons why a number of developments have been refused on technical grounds rather than on the merits of the scheme. This is hindering the achievement of sustainable development in the UK.

In my view such situations are avoidable.



## Environmental Impact Assessment

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For certain types of development environmental assessment (EA) is required to be carried out **before** planning permission is granted.

*'Installations for the harnessing of wind power for energy production (wind farms)'* fall within Schedule 2 of the EIA Regulations. The indicative thresholds for wind farms are:

*“(i) The development involves the installation of more than 2 turbines; or*

*(ii) the hub height of any turbine or height of any other structure exceeds 15 metres.”*

EA is required for such windfarm projects if the proposal is likely to have significant environmental effects.

The environmental statement must describe the **likely significant effects** of the development on the environment as well as a description of the measures proposed to prevent, reduce and where possible offset any significant adverse effects on the environment.



## Environmental Impact Assessment contd...

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PPS22 advises that ETSU-R-97 should be used to assess and rate noise from wind energy development. The document describes a framework for the assessment of wind farm noise and provides indicative noise levels considered to offer:

*“a reasonable degree of protection to windfarm neighbours, without placing unreasonable restrictions on wind farm development or adding unduly to the costs and administrative burdens on wind farm developers of local authorities. The suggested noise limits and their reasonableness have been evaluated with regard to regulating the development of wind energy in the public interest.”*

Developers and local authorities should satisfy themselves that any environmental statements meet the requirements of the EIA Directives and are adequate. Otherwise any permissions could be challenged.

One of the key considerations is whether ETSU is an appropriate and sufficient tool, when used alone, for EIA.



## Environmental Impact Assessment contd...

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In addition, the environmental statement should provide an indication of any difficulties encountered by the applicant in compiling the required information such as issues associated with scientific uncertainty.

Currently, too much effort is focussed on the merits, or otherwise, of ETSU. This is clouding the issues.

Adopting a systematic framework for dealing with uncertainty will help to adopt a more mature approach to EIA than is often applied.

Developers may be concerned about dealing with uncertainty because they feel that this could lead to the imposition of unreasonable requirements or restrictions. However, this should not be the case.

A systematic evaluation of uncertainty does not mean that the EIA should adopt a cautionary approach to every aspect of uncertainty. Ideally, this information should be addressed comprehensively within a framework so that the overall level of risk can be properly understood (not necessarily quantified) and communicated. If managed properly, such a framework for should help to manage risk and to reach agreement on contentious issues.



## The planning system and its provisions

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The planning system can limit harm by imposing conditions and other planning controls e.g. legal agreements. PPG24 advises:

*The planning system has the task of guiding development to the most appropriate locations. It will be hard to reconcile some land uses, such as housing, hospitals or schools, with other activities which generate high levels of noise, but the planning system should ensure that, wherever practicable, noise-sensitive developments are separated from major sources of noise (such as road, rail and air transport and certain types of industrial development). It is equally important that new development involving noisy activities should, if possible, be sited away from noise-sensitive land uses.*

It then goes on to state that:

*Where it is not possible to achieve such a separation of land uses, local planning authorities should consider whether it is practicable to control or reduce noise levels, or to mitigate the impact of noise, through the use of conditions or **planning obligations**. (my emphasis)*



## The planning system and its provisions contd...

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Planning conditions must meet the six tests are satisfied, namely where the conditions are:

- i. necessary;
- ii. relevant to planning;
- iii. relevant to the development to be permitted;
- iv. enforceable;
- v. precise; and
- vi. reasonable in all other respects.

In addition to planning conditions, the use of legal agreements can provide important mechanisms to overcome technical difficulties and to overcome contentious elements of the scheme e.g. investigation in the event of complaints.

For example, a well drafted planning obligation could be used to provide safeguarding and protective mechanisms to resolve noise issues when things go wrong e.g. where the actual scale of the impacts is greater than predicted.

Such mechanisms may prove more effective means of resolving noise problems than trying to rectify problems using statutory noise nuisance provisions.