BACKGROUND

This guidance note focuses on the concept of Statutory Nuisance. The expressions, 'nuisance' and 'prejudicial to health' are used in section 79(1)(a) of the Environmental Protection Act 1990(EPA). The expressions, 'nuisance' and 'prejudicial to health' represent distinct approaches and therefore, will be treated separately in this Note. In recent years there have been a number of important decisions at appellate level on this paragraph of subsection (1). The case law will be summarised.

The law

Under section 79 of the Environmental Protection Act 1990 a variety of circumstances are designated as a statutory nuisance. There are two basic ways something may be designated as a statutory nuisance, either as a "nuisance" or as something deemed to be "prejudicial to health". However, what constitutes a nuisance or something that is prejudicial to health is not defined in a general sense but rather has to be related to the nature of the circumstances or situation as defined under the eight specified sub-sets of circumstances detailed in the legislation, under section 79(1)(a). These are:

- ***(a) 'any premises in such a state as to be prejudicial to health or a nuisance.'***
- ***(b) 'smoke emitted from premises so as to be prejudicial to health or a nuisance'***
- ***(c) 'fumes or gases emitted from premises so as to be prejudicial to health or a nuisance'***
- ***(d) 'any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance.'***
- ***(e) any accumulation or deposit which is prejudicial to health or a nuisance***
- ***(f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance***
- ***(g) noise emitted from premises so as to be prejudicial to health or a nuisance***
- ***(g(a)) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street or in Scotland a road.***
- ***(h) any other matter declared by any enactment to be a statutory nuisance***

DEFINITION OF NUISANCE

In order to fully understand the judicial approach to the interpretation of the expression, 'nuisance' as used in the EPA it is necessary to briefly summarise the meaning of nuisance as it is used at common law.

What does the expression 'nuisance' mean at common law?

The courts have never attempted to proffer a comprehensive definition of the term nuisance at common law. Indeed, it is suggested that to attempt to precisely define the expression,' nuisance' would serve no useful purpose. However, by way simply of a working definition it is suggested that the law of nuisance is concerned with striking a balance between conflicting uses of land. The conflict is pragmatically resolved by the courts imposing a duty on a proprietor of land not to use his land in an unreasonable way so as to prejudice the enjoyment of the land of another.

How do the courts ascertain if a nuisance exists?

The courts take a variety of factors into account when deciding if an adverse state of affairs is capable of ranking as a nuisance. However, all of the factors, which are listed below, are not mechanically applied in every nuisance case. Rather, the courts have tended to emphasise several factors often to the exclusion of others. Again, it is possible that each factor may be accorded different weighting in the judicial scales.

Sensitivity of the pursuer

It is a general rule that the courts are unwilling to assist the oversensitive. In the leading case of *Heath v Brighton Corp.* [1908][1] it was held that the court could not grant the complainant a remedy since he was adversely affected by the noise in question simply because he possessed hypersensitive hearing.

Could the pursuer have avoided the nuisance?

The courts are reluctant to place the pursuer under any obligation to avoid the relevant nuisance *(Webster v Lord Advocate* [1984][2] .

Is the state of affairs typical of modern life?

In *Hunter v Canary Wharf Ltd.* [1997][3] the House of Lords was of the view that if the state of affairs which was complained of was typical of modern life it was less likely to rank as a nuisance.

Social utility (or benefit) of the defender's conduct

The more socially useful an activity is, the less likely the court will be willing to castigate the state of affairs which is complained of as a nuisance (*Harrison v Southwark and Vauxhall Water Co* [1891])[4] . The courts have explicitly recognised the social benefits, which accrue from factories (*Bellew v Cement Ltd.* [1948])[5] . However, there is little authority on the concept of public utility being employed in other situations.

Did the pursuer live in 'fear' of the adverse state of affairs?
If the pursuer lives in fear that the nuisance will manifest itself it is more likely that the court will hold that a nuisance exists (*Blackburn v ARC Ltd* [1998])[6].

Motive of the defender
If the relevant state of affairs is created simply to annoy the pursuer, in other words, if the state of affairs is motivated by spite, the courts lean heavily towards the view that relevant state of affairs is a nuisance in law (*Christie v Davey* [1893])[7]; (*Western Silver Fox Farm Ltd. v Ross and Cromarty County Council* [1940])[8].

Locality
If the given state of affairs is typical of a given locality the courts are less inclined to regard the state of affairs as a nuisance in law (*Trotter v Farnie* [1830])[9]. While the courts may be less inclined to castigate as a nuisance a state of affairs which is indigenous in the area, they are not prepared to accord the defender carte blanche to create a nuisance (*Rushmer v Polsue and Alfieri* [1906])[10].

Duration and intensity
The length of time which a state of affairs exists as well as its intensity are taken into account when considering if a nuisance exists (*Bamford v Turnley* [1862])[11].

Time of day
This factor is applicable only in relation to noise (*Bamford v Turnley* [1862])[11] and probably light pollution. The obvious reason for this is that night noise, etc. is more likely to disturb than noise, which exists during the day.

The need for a state of affairs
It is necessary that the alleged nuisance emanates from a state of affairs in contrast to something which is simply fleeting or transitory (*Cunard v Antifyre Ltd.* [1933])[12].

Requirement of fault
In Scots law it is necessary to prove *culpa* or fault on the part of the defender (*RHM Bakeries v Strathclyde Regional Council* [1985])[13].

STATUTORY NUISANCE

Under section 79 of the Environmental Protection Act 1990 a variety of circumstances are designated as a Statutory Nuisance and these were within the earlier section relating to the law. As previously stated these are defined under eight specified sub-sets and the following provides further explanation and opinion.

(a) 'any premises in such a state as to be prejudicial to health or a nuisance.'

This subsection should be regarded as offering two quite separate approaches.

As far as premises, which are 'prejudicial to health', are concerned it is the state of the premises as opposed to the use to which they are put which constitutes the relevant proscribed state of affairs (R v Parlby [1889])[14]. In order to rank as prejudicial to health it is not sufficient that the state of affairs interferes with personal comfort. The premises must cause injury to health (*Salford City Council v McNally* [1976])[15]. That which renders the premises prejudicial to health need not emanate from the premises in question. It can arise from a state of affairs, which exists outside the premises (*Pollway Nominees Ltd v Havering London Borough Council* [1989])[16]. There has to be some inherent feature in the premises that is in itself prejudicial to health. It is therefore insufficient that the layout of the house is considered unsatisfactory. For example if the location of the wc compartment in a house was such that residents would be inclined to wash their hands in a kitchen sink which adjoined the wc compartment, these circumstances would not rank as a statutory nuisance (*Oakley v Birmingham City Council* [2001])[17]. In order to be prejudicial to health the relevant circumstances must impact on an individual's physical well-being (*Robb v Dundee City Council* [2002])[18]. Lord Johnston was of the view that the premises had to pose a general risk to health in contrast to that of a particular person.

As far as the meaning of the expression, **'nuisance'** is concerned the requisite state of affairs can exist within the relevant premises (*Robb v Dundee City Council* [2002])[18]. Lord Cameron, in the Inner House was of the view that the word 'nuisance' as used in the section bore a different meaning to that used at common law. It was necessary that the relevant state of affairs was injurious to health as well as a cause of material discomfort and annoyance. The other judges did not agree on this point and in the author's view it is not necessary that the adverse state of affairs should impact on human health. It is sufficient that the state of affairs causes discomfort.

(b) *'smoke emitted from premises so as to be prejudicial to health or a nuisance'*
(c) *'fumes or gases emitted from premises so as to be prejudicial to health or a nuisance'*
(d) *'any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance.'*

Paragraphs (b) and (c) of section 79(1) supplement the provisions of the Clean Air Act 1993. As far as paragraph (b) is concerned it has been held that the expression smoke includes the smell of smoke (*Griffiths v Pembrokeshire CC* [2000])[19]. Section 79(2) provides that (b) does not apply to various premises occupied by the Crown or visiting forces for the purpose of defence. Furthermore, section 79(3) provides that section 79(1)(b) does not apply, *inter alia*, to (a) smoke emitted from a chimney of a private dwelling within a smoke control area and dark smoke emitted from a chimney or a building or a chimney serving the furnace of a boiler or industrial plant. "Fumes" means any airborne matter smaller than dust. "Gas" means vapour and moisture precipitated from vapour, section 79(7). The paragraph does not apply in relation to premises other than private dwellings, section 79(4). In the absence of authority the paragraph would also cover odours and smells. In order to come within the 'nuisance limb' of section 79(1)(d) the state of affairs must materially affect the personal comfort of those residing outwith the premises *Wivenhoe Port Ltd. v Colchester BC* [1985][20]. It was also held in this case that dust falling on cars, gardens or trees would not rank as a statutory nuisance. It is suggested that this view is incorrect in the wake of *Robb v Dundee City Council* (above).

(e) any accumulation or deposit which is prejudicial to health or a nuisance

There is tendency for courts to construe terms 'accumulation' and 'deposit' conjunctively ie the terms mean the same (*Coventry City Council v Cartwright* [1975])[21].

In *Great Northern Railway v Lurgan Commissioners* [1897][22] the expression 'accumulation' implied some gradual accretion or heaping up of matter from day to day. The accumulation could also exist by reason of deliberate human conduct for example, by dumping (*Coventry City Council v Cartwright* [1975])[21] as well as by the operation of nature, for example, by refuse matter being deposited by a stream on its banks. The accumulation or deposit must have the capacity to generate disease, etc. It is, therefore, insufficient that the relevant danger manifests itself by the likelihood of people being injured by coming into contact with the deposit or accumulation while walking on the relevant land (*Coventry City Council v Cartwright* [1975])[21].

While there is no authority under the EPA or in the preceding Public Health Acts it has been held that a deposit in terms of the now repealed Control of Pollution Act 1974 need not be permanent (*R v Metropolitan Stipendary Magistrate, ex p London Waste Regulation Authority* [1993]).[23]

(f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance

It has to be shown that either the place or the manner of keeping the animal prejudices health or is a nuisance. The keeping of the animal may be for a relatively short time (*Steers v Manton* [1893])[24]. Animals that create a noise nuisance will also fall under this paragraph (*Coventry City Council v Cartwright* [1975])[21]. A kennel which is kept in close proximity to a neighbouring house, by reason of which the occupants are disturbed, would come within the scope of the paragraph, as would premises which became filthy and, in turn, presented a health risk by virtue of being too small to accommodate the animals satisfactorily. It is also suggested that the paragraph would also be relevant in a situation in which zoonotic disease could be transmitted to humans by virtue of either the place or the manner in which the animals are kept. *Quare* the keeping of dogs, which roam about the neighbourhood and/or public places and defecate there.

(g) Noise emitted from premises so as to be prejudicial to health or a nuisance

(g(a)) Noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street or in Scotland a road.

The reader is asked to refer to Separate Guidance Note: Neighbourhood Noise: GN10 – 05/2000) for specific details.

(h) any other matter declared by any enactment to be a statutory nuisance

Any nuisance provision in any public general or private Act of Parliament would come within the scope of this paragraph, as would similar provisions in local authority by-laws. In most cases this would allow the courts to impose more severe penalties for failure to abate the nuisance in question.

Falling under this heading would be certain provisions of the Public Health (Scotland) Act 1897, for example, section 30 injuring water closets so as to cause nuisance, water closets used in common which cause a nuisance, tents, vans used for human habitation which cause a nuisance.

A local authority may not, without the consent of the Scottish Executive, institute summary proceedings under section 79(1)(b)(d)(e)(g) or (g(a)) if proceedings might be instituted under either Part 1 or regulations which were made under section 2 of the Pollution Prevention and Control Act 1999.

SUMMARY PROCEEDINGS FOR STATUTORY NUISANCES

Duty to serve notice

The local authority is under a duty to inspect its area to detect any statutory nuisance, section 79(1). Under section 80(1) a local authority are under a duty to serve an abatement notice if it is satisfied that a statutory nuisance exists or is likely to occur or recur. If it appears to the local authority, on a balance of probabilities, that a nuisance does exist, it has no discretion. The notice must be served (*R v Carrick DC ex p Shelley* [1996])[25]. There is no authority on the point whether a notice must be served if the local authority is of the view that a defence (e.g. that of best practicable means) would be applicable. It is suggested that the notice must still be served.

Content of the notice

Under section 80(1) where the local authority is satisfied that a nuisance exists or is likely to occur or recur it must serve a notice which imposes all or any of the following requirements:

(a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;
(b) requiring the execution of such works and the taking of such other steps, as may be necessary for any of those purposes.

There is no requirement that the local authority should consult the intended recipient of the abatement notice without having first discussed the matter him or her (*R v Falmouth and Truro Port Health Authority* [2000])[26] . The notice requires to specify either the time or times within which the requirements of the notice are to be complied with. It is open to the local authority to take one or other course of actions. It is perfectly lawful for the local authority simply to require the recipient of the notice to abate the nuisance (*Budd v Colchester BC* [1999])[27] . It must be made clear to the recipient what is wrong (*Myatt v Teignbridge DC* [1994])[28] . If the local authority requires the execution of works to remedy a nuisance such steps must be specified. However, where the notice simply requires the recipient to 'take steps' to abate the nuisance in question the requisite steps need not be specified since the notice could be complied with by the taking of some form of passive action (*Sevenoaks DC v Brands Hatch Leisuregroup Ltd* [2000])[29] . It is suggested that abatement notices should make quite clear whether the execution of *works* or other measures is required on the part of the author of the nuisance. To avoid confusion and possible grounds for challenge it seems sensible that a local authority, in framing notices in terms of section 80 should require the person who is responsible simply to abate the nuisance in question (or to prohibit its recurrence, etc) unless there is some good reason why further measures should be specified.

One should adopt a commonsense approach to the interpretation of abatement notices. In deciding whether a notice is valid one should decide whether the recipient can identify the nuisance concerned. In so determining this one is not confined to the four corners of the notice in question. External factors can be taken into account (*Cambridge City Council v Douglas* [2000])[30] .

On whom should notice be served?

The abatement notice requires to be served on the person responsible for the nuisance-section 80(2)(a) unless the nuisance arises from any defect of a structural character in which case the notice requires to be served on the owner of the premises (section 80(2)(b) or where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred, in which case the notice must be served on the owner or occupier of the premises (section 80(2)(c)).

Meaning of person responsible

Under section 79(7) 'person responsible' means the person or persons 'to whose act, default or sufferance the nuisance is attributable.'

'Default'

The concept of default encompasses both contractual and statutory obligations. It simply means not doing what is reasonable in the circumstances (*Re Young and Hartson's Contract* [1885])[31] . Contractual provisions between parties (e.g. re landlord and tenant in relation to the state of premises) do not determine statutory responsibilities (*Wincanton RDC v Parsons* [1905])[32] .

'Sufferance'

In order to 'suffer' an adverse state of affairs one must be in a position to put an end to it and fail to do so (*Rochdale v Port of London* [1914])[33] .

Appeal against notice

A person served with an abatement notice can appeal against the notice to the sheriff within 21 days from the date the notice was served section 80(3). The Statutory Nuisance (Appeals)(Scotland) Regulations 1996 (SI 1996/1076) apply in relation to appeals brought under section 80(3). The regulations specify the grounds upon which an appeal may be made. Such grounds include that the appeal is not justified by section 80 and that there has been some informality in the notice. The defender cannot challenge the terms of a notice in the subsequent trial if the notice could have been challenged by way of appeal to the sheriff court (*Stagecoach Ltd. v McPhail* [1988])[34] .

Contravention of notice, etc

If a person on whom an abatement notice is served without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice he commits an offence-section 80(4). In *Wellingborough BC v Gordon* [1993][35] it was held that the holding of a birthday party by the defendants did not provide a reasonable excuse. This case is also authority for the proposition that whether an excuse is reasonable or not must be judged objectively. It is an offence to fail to comply with an abatement notice-section 80(5).

Best practicable means

In relation to certain nuisances (eg in relation to certain nuisances relating to industrial premises) the defence of best practicable means is available section 80(7). The defence must be established on a balance of probability (*Chapman v Gosberton Farm Produce Com*pany [1993])[36]. The 'best' means are those, which are available to secure the end in view (*Scholefield v Schunck* [1855])[37]. Not only should technical factors be taken into account but also social and economic factors such as working agreements made with trades unions, cost, etc (*National Smokeless Fuels v Perriman* [1987])[38]. Whether the means employed by the defender are the best should be decided objectively (*Tewkesbury BC v Dennis Deacon* [2003])[39].

Several authors, default proceedings

Section 81(1) gives effect to the well-established rule at common law that the author of an adverse state of affairs is liable in nuisance notwithstanding that the state of affairs would not have constituted a nuisance without the presence of the other state of affairs.

Section 81 and 81A make provision for recovering money in default.

Thanks for the assistance in preparation of the guidance are due entirely to Professor Francis McManus, M.Litt, LL.B(Hons), F.R.I.P.H.H., M.R.E.H.I.S., Cert. Ed. whose advice informed all aspects of its production. The information is produced with his acknowledgement and permission. Professor McManus is an External Consultant in Environmental Law to HPS.

ADDENDUM

"Prejudicial to Health" Provisions – Points for Consideration

Attempts to use the Prejudicial to Health provisions may prove problematic on the basis of the difficulty in obtaining sufficiently convincing evidence of a quantifiable level of hazard and that this is associated with a defined level of risk to health. Where it is clear that the "nuisance" provision itself is likely to succeed, the value of trying to pursue a case on the basis of proving a defined link to ill health may be questionable. In general terms, trying to prove a definitive link between an environmental source and any specific health outcome is likely to be difficult, time consuming and may not ultimately produce the required evidence.

The range of issues faced by investigators attempting to establish if something is prejudicial to health will include the following:

- Establishing a source/pathway/receptor model for the situation.
- Establishing a biologically plausible link between an alleged cause and a health effect
- Identifying a specific "agent" to which people are exposed (microbiological, chemical or other) and measuring the level of exposure to the identified agent
- Measuring and quantifying the actual health effects
- Establishing evidence for a dose/effect relationship
- Identifying other possible explanations for the health effects (confounding factors)
- Measuring the strength of association between the observed health effect and the amount of exposure to the alleged agent

The legislation does not provide a definition of "health" and hence there is very little clear guidance on what would constitute a general state of affairs, which would be considered prejudicial to health. It seems that the focus to date has been on physical well-being and a general risk to health rather than on non-physical health effects or risks to particularly susceptible individuals.

In situations where there is little if any evidence of a health effect in terms of cases with a definite set of symptoms, a condition or physical disease, then providing a robust health based case is likely to be very difficult. Situations where the health effects are primarily psychological will be particularly problematic, given the lack of sympathy by legislative bodies to these concepts. In short, where a "nuisance" is self evident by the general standards most people would apply, it is may be better to consider pursuing a case on these grounds than to try to prove the existence of a hazard that is "prejudicial to health".

REFERENCES

Thanks for the assistance of Dr Colin Ramsay, Consultant Epidemiologist at HPS in providing points to be considered in the use of "prejudicial to health" when pursuing a case of statutory nuisance in terms of the Environmental Protection Act 1990.

1 *Heath v Brighton Corp.* [1908] 24 TLR 414
2 *Webster v Lord Advocate* [1984] SLT 13
3 *Hunter v Canary Wharf Ltd.* [1997] 2 WLR 684
4 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch. 409
5 *Bellew v Cement Ltd.* [1948] IR 61
6 (*Blackburn v ARC Ltd* [1998]) Env LR 469
7 *Christie v Davey* [1893] 1 Ch. 316
8 *Western Silver Fox Farm Ltd. v Ross and Cromarty County Council* [1940] SLT 144
9 *Trotter v Farnie* [1830] 9 S 144
10 *Rushmer v Polsue and Alfieri* [1906] 1 Ch. 234
11 *Bamford v Turnley* [1862] 31 LJQB 286
12 *Cunard v Antifyre Ltd.* [1933] 1 KB 551
13 *RHM Bakeries v Strathclyde Regional Council* [1985] SC(HL) 17
14 R v Parlby [1889] 22 QBD 520
15 *Salford City Council v McNally* [1976] AC 379
16 *Pollway Nominees Ltd v Havering London Borough Council* [1989] 88 LGR 192
17 *Oakley v Birmingham City Council* [2001] 1 AllER 385
18 *Robb v Dundee City Council* [2002] SLT 853
19 *Griffiths v Pembrokeshire CC* [2000] Env. LR 622
20 *Wivenhoe Port Ltd. v Colchester BC* [1985] JPL 175
21 *Coventry City Council v Cartwright* [1975] 1 WLR 845
22 *Great Northern Railway v Lurgan Commissioners* [1897] 2 IR 340 at 351
23 *R v Metropolitan Stipendary Magistrate, ex p London Waste Regulation Authority* [1993] 3 AllER 113
24 *Steers v Manton* [1893] 57 JP 584
25 *R v Carrick DC ex p Shelley* [1996] Env LR 273
26 *R v Falmouth and Truro Port Health Authority* [2000] The Times, 24th April 2000
27 *Budd v Colchester BC* [1999] Env LR 739
28 *Myatt v Teignbridge DC* [1994] Env LR 78
29 *Sevenoaks DC v Brands Hatch Leisuregroup Ltd* [2000] 5th May 2000
30 *Cambridge City Council v Douglas* [2000] 21st December 2000
31 *Re Young and Hartson's Contract* [1885] 31 ChD 168
32 *Wincanton RDC v Parsons* [1905] 2 KB 34
33 *Rochdale v Port of London* [1914] 2KB 916
34 *Stagecoach Ltd. v McPhail* [1988] SCCR 289
35 *Wellingborough BC v Gordon* [1993] 1 Env LR 218
36 *Chapman v Gosberton Farm Produce Co*mpany [1993] 1 Env LR 191
37 *Scholefield v Schunck* [1855]19 JP 84
38 *National Smokeless Fuels v Perriman* [1987] 1 Envir. Law No 2 p5
39 *Tewkesbury BC v Dennis Deacon* [2003] Unreported Queens Bench case 20/10/2003