

# Environmental Health (Environmental Protection) – Operating Plan

## CONTENTS

1. General
  - 1.1 Introduction
  - 1.2 Development and review of Operating Plan
  - 1.3 Definitions
  - 1.4 General principles
  - 1.5 Responsibilities
    - 1.5.1 Authorised Officers
    - 1.5.2 Service Users
  - 1.6 Case closure
2. Requests for service (complaints/enquiries)
  - 2.1 What is a 'Statutory Nuisance'?
  - 2.5 What will not be considered under the 'Statutory Nuisance' provisions of the 1990 Act?
3. Operating Plan
  - 3.1 Legislative background
  - 3.2 Prioritisation
4. Enforcement actions
  - 4.1 Informal
  - 4.2 Formal
  - 4.3 Reports to the Procurator Fiscal
5. Complaints
6. Links

# Environmental Health (Environmental Protection – Operating Plan

## 1. General

### 1.1 Introduction

This document sets out the City of Edinburgh Council’s Operating Plan with regard to investigations by the Environmental Protection team, part of the Environmental Health Service.

The document sets out the key principles under which officers authorised to enforce the relevant legislation (‘Authorised Officers’) will seek to achieve compliance with the civil and criminal legislation enforced by the Environmental Health (Environmental Protection) team. It is intended to guide Authorised Officers when deciding what course of action to take on discovery of an infringement, and to improve consistency in the decision-making process.

The Operating Plan is also designed to help businesses and individuals to understand the Council’s objectives, methods for achieving compliance, and the criteria considered when deciding on the most appropriate response to a potential breach of legislation.

All decisions about taking enforcement action will have regard to current statutory guidance, codes of practice, Crown Office guidance on reporting criminal offences, and other relevant legislation including the Human Rights Act 1998.

### 1.2 Development and review of Operating Plan

This document has been developed with regard to current legislation, statutory guidance, and practice. The Operating Plan will be reviewed every five years, or more frequently as required.

### 1.3 Definitions

Term	Meaning in this document
‘Operating Plan, ‘the Operating Plan’	The Operating Plan described in this document
‘Authorised Officer’	Any officer authorised by the City of Edinburgh Council to enforce legislation within the remit of the Environmental Health Service
‘the Council’	The City of Edinburgh Council
‘the 1990 Act’	The Environmental Protection Act 1990 (as amended)
‘service user’	Individual or business requesting advice or assistance from the Environmental Protection

	team or assistance to resolve a complaint or to report a potential breach of relevant legislation
'request for service'	Request for advice or assistance to resolve a complaint from the Environmental Protection team or to report a potential breach of relevant legislation

## 1.4 General principles

Each case will be considered individually and on its merits. However, general principles apply to the way that each case must be approached.

- 1.4.1 Enforcement decisions will be fair, independent, objective and made in line with the Council's Equalities Policy. Such decisions will not be affected by improper or undue pressure from any source.
- 1.4.2 City of Edinburgh Council is a public authority for the purposes of the Human Rights Act 1998. Authorised Officers will therefore apply that Act, in relation to the legislation enforced.
- 1.4.3 This Operating Plan aims to promote efficient and effective approaches to regulatory enforcement with respect to Environmental Health (Environmental Protection), improving regulatory outcomes without imposing unnecessary burdens.
- 1.4.4 If a complaint results in an Authorised Officer determining that enforcement action against a business or individual may follow, officers will notify that business or individual as soon as is practicable of any intended enforcement action, unless to do so could impede an investigation or pose a safety risk to those concerned or the general public.
- 1.4.5 During the course of enforcement investigations/actions, affected individuals and businesses will be kept informed of progress. Confidentiality will be maintained and personal information about individuals will only be released to a Court when required and/or in accordance with the Data Protection Act 2018 and the General Data Protection Regulations.
- 1.4.6 All Authorised Officers will be expected to adhere to the Operating Plan in order to achieve consistent, balanced and fair enforcement and to co-operate in helping businesses and individuals to comply with the law

## 1.5 Responsibilities

### 1.5.1 Authorised officers

All Authorised Officers shall:

- 1.5.1.1 Undertake all investigatory and enforcement duties in a professional and courteous manner.

1.5.1.2 Ensure that they abide by the requirements of this Operating Plan, relevant legislation and guidance, and the policies and procedures of the City of Edinburgh Council.

1.5.1.3 Ensure that they are free from conflicts of interest.

1.5.1.4 Maintain reasonable levels of communication with service users.

1.5.1.5 Treat service users with respect and dignity.

## 1.5.2 **Service users**

To achieve an efficient and appropriate outcome, service user(s) are requested to work with Authorised Officers to build evidence.

1.5.2.1 Generally service users should engage with the source of the problem in the first instance to attempt an informal resolution.

1.5.2.2 Where that fails or is not practical, the service user should provide Authorised Officers with basic information to determine the level of investigation required. In the first instance this will usually include their address and contact details, the concern name and address, and contact details if available, and a description of the issue.

1.5.2.3 Anonymous complaints will not be investigated unless there is an obvious, imminent and serious risk to public health or safety.

1.5.2.4 Depending on the case, the service user may be asked to take photographs or record events (such as times when noise is experienced) for a period.

1.5.2.5 Often, to fully investigate, Authorised Officers will need access to the service user's property. Whilst recognising that a service user might have concerns about providing access it is normally essential to progress a case and if access is refused, Authorised Officers will generally not be able to continue the investigation and will close the case.

1.5.2.6 Authorised Officers should be treated with respect and dignity at all times.

## 1.6 **Case closure**

1.6.1 If Authorised Officers have made three attempts to witness the contravention within a 12 week period, but no evidence has been found, the case will generally be closed. An extension of four weeks may be considered in exceptional circumstances. Cases will also be closed if the service user does not maintain reasonable contact with the team to update on reports of potential nuisance or facilitate visits at suitable times.

- 1.6.2 Authorised Officers may have to advise a service user that a case will be closed because officers have not found a breach of legislation that the Environmental Protection team can assist with, or because reasonable attempts have not provided sufficient evidence for the Council to consider taking action. Once such a decision and the reasons for closing the investigation are communicated to the service user, the Service will not enter into further correspondence about the issue unless something material changes. Service Users can use the Council complaints process should they wish to complain - see below.
- 1.6.3 Where specific legislation (such as Planning, Licensing, or Antisocial Behaviour) is relevant to the issue, or where there is a statutory duty for another body to investigate (e.g. Scottish Water or Scottish Environmental Protection Agency) then the service user will be directed to the appropriate Council team or external body.

## **2. Requests for service**

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### **2.1 What is a 'Statutory Nuisance'?**

A statutory nuisance must interfere with personal comfort in a manner that affects a person's wellbeing and/or health. For example, dust affecting cars would not be classed as 'nuisance', but the same dust in a person's eyes or hair would interfere with their personal comfort (and/or their health), and so could be classed as 'nuisance'. Specific categories of what may constitute a Statutory Nuisance are found in section 79 of the Environmental Protection Act 1990 ('the 1990 Act').

Authorised Officers will decide whether this definition has been met.

The legal definition of a 'statutory nuisance' does not cover harm to property.

### **2.2 There are eight key issues which must all be considered by officers when deciding whether a nuisance exists:**

- Impact
- Locality
- Time
- Frequency
- Duration
- Convention
- Importance
- Avoidability

### **2.3 The determination of whether a Statutory Nuisance exists is generally a matter of professional judgement by an Authorised Officer, who would be required, if challenged, to give evidence in court regarding their professional judgement.**

2.4 'Statutory Nuisance' can apply to a wide range of situations, and cases are prioritised based on the type of complaint and the nuisance. Some minor matters may not be prioritised for investigation, although information will be recorded for intelligence purposes. Investigations will generally only take place if the problem is serious and persistent.

2.5 **What will not be considered under the 'Statutory Nuisance' provisions of the 1990 Act?**

'Statutory Nuisance' does not include lower-level annoyance, frustration or inconvenience and cannot be used for safety related issues. Authorised Officers must consider how the issue would affect the average individual, rather than any person who is particularly sensitive to it.

2.5.1 Specific exemptions include **traffic noise, aircraft noise, political demonstrations and noise from premises occupied for naval, military or air force** purposes.

2.5.2 Statutory Nuisance doesn't apply to smells from residential properties, and therefore Authorised Officers will not investigate complaints about **domestic cooking or cigarette odours**.

2.5.3 The Courts have held that **poor sound insulation between properties that allows external noise to be heard** not to be a Statutory Nuisance, and so this is not something that Authorised Officers can enforcement action on.

2.5.4 **Noise from Council waste collection** complaints will be referred to Waste Services for investigation and resolution.

2.5.5 **Slow leaks and minor water ingress between private properties** would not result in action. This should be resolved between the interested parties and, where appropriate, their insurance companies. Only in an emergency event, where there is a large and uncontrollable release of water, or where significant mould and dampness has occurred can Authorised Officers consider formal action.

2.5.6 **Water ingress involving a Council property** (whether the source or affected property) should be dealt with by City of Edinburgh Council Housing service.

2.6 **Service requests under other legislation**

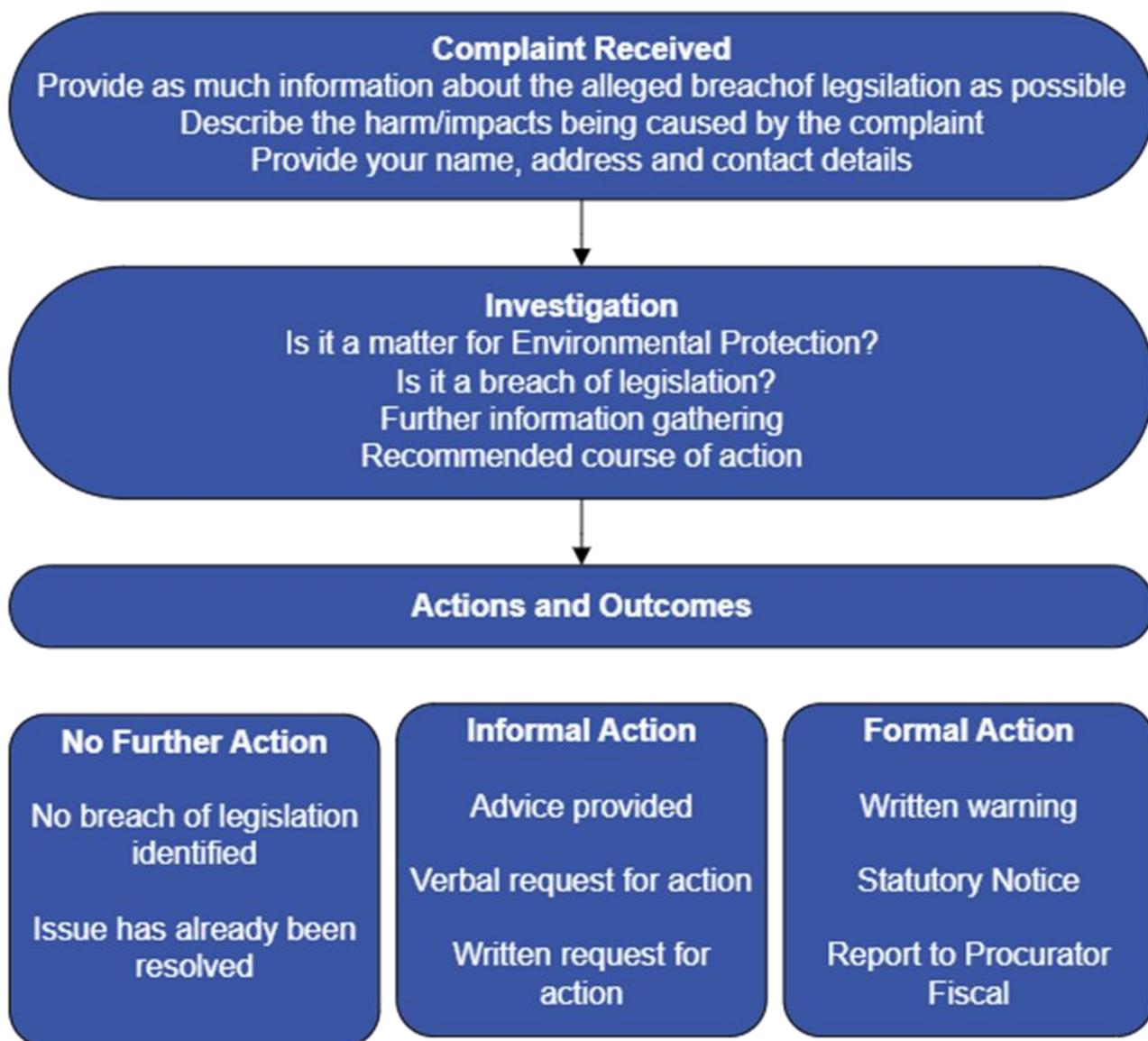
2.6.1 **Construction site noise** is covered by the Control of Pollution Act 1974, which allows Local Authorities to determine appropriate times for noisy construction works. In Edinburgh the general expectation is that noise from construction activities which can be heard in residential properties should only happen from 07.00 – 19.00 hours, Monday to Saturday. Exemptions can be considered for public safety, significant road traffic management, or emergency purposes.

- 2.6.2 Construction activities (which can include renovations and roadworks) are usually noisy, so are usually controlled by restricting the times that they are allowed to happen. **DIY works (where people are working in their own homes)** causing noise would not be subject to the same rules. Although neighbours are expected to realise that such work may happen at the weekend or during evenings, regular breaks and consideration of the noise and time of day should be provided to neighbours.
- 2.6.3 Road works which generate noise or vibration complaints will be referred to the Roads Service to respond.
- 2.6.4 The Civic Government (Scotland) Act 1982 provides a discretionary power for Authorised Officers to deal with **water leaks between properties** if there is a significant amount of uncontrollable water. If the leak can be contained, we will try to trace the property owners or responsible persons. If the leak causes long-term significant dampness that an Authorised Officer decides is a Statutory Nuisance, enforcement action will be possible. However, if this is not the case, in the end the dispute is between the property owners, and ultimately civil court action would be the appropriate process.
- 2.6.5 Properties in a “Filthy and verminous state” should be resolved by the Housing Service or any Registered Social Landlord where they have ownership.

### 3. Operating Plan

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This Operating Plan aims to ensure that the Council’s procedures are fair and reasonable, that interested parties are made aware of what is required and that they are kept informed at key stages within the enforcement process. The following diagram illustrates the main stages of the enforcement investigation process.



### 3.1 Legislative background

The 1990 Act requires local authorities to "take such steps as are reasonably practicable" to investigate complaints of statutory nuisance from any person living within its area. Although local authorities have a duty to investigate statutory nuisances, Authorised Officers must first assess whether a statutory nuisance exists.

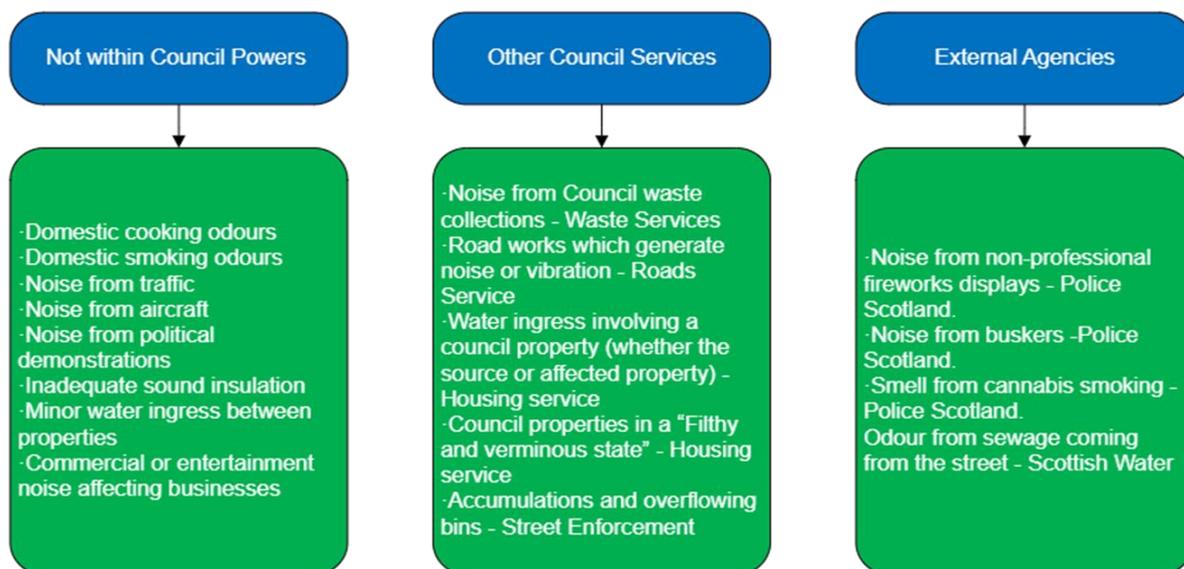
3.1.1 As the investigative steps which local authorities take must be "reasonably practicable", whether a local authority investigates, and the level of investigation, will often depend on the circumstances and the degree to which Authorised Officers consider the issue to be a priority.

3.1.2 For non-Statutory Nuisance complaints, legislation generally requires a certain level of evidence to determine if a contravention has occurred. Most legislation empowers Authorised Officers to gather evidence, enter premises, and take formal action should an informal attempt at resolution fail.

## 3.2 Prioritisation

Whilst a wide range of complaints are investigated by the Council's Environmental Health (Environmental Protection) team, it is important to acknowledge the restrictions on and limits to the action that Authorised Officers can take.

Some common complaints received by the Environmental Health Service that are not within the scope of the Environmental Protection team are shown in the table below.



## 4. Enforcement actions

Investigations and enforcement outcomes will vary depending on individual case circumstances. Decisions about the most appropriate course of enforcement action to be taken are based upon professional judgement, legal guidelines, statutory codes of practice and Crown Office guidance, and this Operating Plan. There is a presumption that the provision of advice or informal requests will be the first step in attempting to resolve a complaint, or non-compliance.

### 4.1 Informal actions

Most complaints are resolved informally by speaking to the parties concerned. Informal action may be appropriate where:

- there is no evidence of a breach of legislation, but advice is required to prevent circumstances from deteriorating further.
- not complying will not pose a significant or immediate risk to public health.
- previous compliance has been established by informal means and this will be more effective than a formal approach.

Informal action can include:

- spoken advice
- spoken warnings

- advisory letter

## 4.2 **Formal actions**

Use of legal procedures and enforcement options are normally reserved for problems of a more serious nature or where attempts at informal resolution have been unsuccessful.

Available formal actions may include:

- Written warning
- Enforcement Notice
- 'Works in default'
- Report to Procurator Fiscal recommending prosecution (see 4.3 below)

### 4.2.1 **Enforcement notice**

If a breach of legislation is determined, and informal action has failed to resolve the issue, or is not considered appropriate, then the legislation may allow for an Enforcement Notice to be served on the responsible person or company representative as appropriate. If the person who is served with that notice has a right to appeal, that information will be provided to them at the point of service.

It should be noted that not all legislation allows Authorised Officers to serve Enforcement Notices. Sometimes the only available option is a direct consideration of report to the Procurator Fiscal.

### 4.2.2 **'Works in default'**

A notice may order 'works in default', which is where the Council orders works to be carried out to resolve a significant breach of legislation. Works in default will only be ordered when an Authorised Officer judges circumstances to be 'most extreme' and where there is a reasonable expectation of costs being recovered timeously. This power is discretionary and not intended to resolve disputes between owners of properties who have the option of taking their own legal action to resolve the dispute. The Environmental Health Service is not resourced to use discretionary powers and to do so would have an impact on the Service's fulfilment of its statutory duties.

Where the consequences of undertaking works in default lead to additional costs to the Council, it will seek to recover these costs wherever possible from the individual or business responsible.

## 4.3 **Reports to the Procurator Fiscal**

A report recommending consideration of prosecution ('prosecution report') will normally only be prepared when a case is considered to have sufficient evidence and it is in the public interest to prosecute.

### 4.3.1 **Sufficiency of Evidence**

The Authorised Officer must be confident that the Procurator Fiscal will be satisfied that there is sufficient evidence available to prove beyond a reasonable doubt that an offence has been committed.

The Authorised Officer must consider the availability of any statutory defence and the likelihood of that defence being made out. Additionally some cases may be subject to statutory time bars which would prevent legal proceedings being raised.

#### **4.3.2 Public Interest Considerations**

Before submitting a report to the Procurator Fiscal, careful consideration must be given to fairly balancing the factors for and against any proposed report. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the accused. Some factors may increase the need to submit a report to the Procurator Fiscal, but others may suggest that another course of action would be more appropriate.

## **5. Complaints about service**

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Complaints about the Environmental Protection team's enforcement activities will be dealt with in accordance with the City of Edinburgh Council's Corporate Complaints Procedure.

## **6. Links**

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- Nuisance provisions of the Public Health etc (Scotland) Act 2008: guidance
- Scottish Parliament Information Centre Briefing – Nuisance Complaints – 2024
- Crown Office and Procurator Fiscal Service (COPFS): a guide for specialist reporting agencies (2006)