



HIGHWAY AUTHORITIES & UTILITIES COMMITTEE

Advice Note No. 2/2014

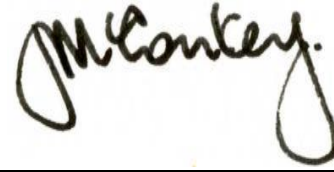
**HAUC(UK) Guidance Document On Applying
The New Section 74 (S74) Regulations**

**Statutory Instrument 2012 No. 2272
The Street Works (Charges for Unreasonable
Prolonged Occupation of the Highway) (England)
(Amendment) Regulations 2012 which amend
Regulation 9 of SI 2009 No.303**

Version:	V1
Control Document No.:	1
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Date of Document:	9 January 2014



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9th January 2014

**HAUC (UK) GUIDANCE DOCUMENT ON APPLYING STATUTORY INSTRUMENT
2012 No. 2272**

**The Street Works (Charges for Unreasonable Prolonged Occupation of the
Highway) (England) (Amendment) Regulations 2012**

OBJECTIVE

The objective of this HAUC(UK) Advice Note, which is based upon the JAG (UK) guidance document 1/2013, is to provide authorities and undertakers with guidance on the changes to section 74 Regulations introduced in October 2012, to provide a consistent authority approach and to assist in the application of a section 74 charging regime. The 2012 Regulations amended regulation 3 and substituted regulation 9 of the 2009 Regulations.

The replacement of road markings is an essential part of the reinstatement of a site and should always be completed prior to opening a works site to the public. This avoids committing an offence under section 71 of NRSWA.

The key principles are that street authorities should:

- use their best endeavours to utilise this process for street works that have overstayed the “prescribed” or “reasonable” period as defined within the Regulations; and
- that each individual situation for an overstay charge being applied **is** considered on its merit
- not unduly deny works extensions, due to unforeseen circumstances, where clear and practical evidence has been provided by a works promoter

SCOPE

This guidance document and process has been developed as part of HAUC(UK)'s desire to support its members in helping them manage the changes needed as a result of the revised regulations.

Street and permit authorities are referred to as authorities throughout this advice note.

The information and details contained in this guidance document do not override any requirements of the New Roads and Street Works Act 1991, Traffic Management Act 2004 or any associated regulations.

The statutory documents can be found on the attached links:

<http://www.legislation.gov.uk/ukpga/1991/22/section/74>

<http://www.legislation.gov.uk/uksi/2012/2272/made>

DURATIONS

Estimated durations are provided by the undertaker and are deemed to be the “reasonable” duration for the works provided that the authority does not challenge this duration. Where a duration is challenged, and the challenge is not accepted, then the authority's view is deemed to be correct unless the undertaker can prove otherwise. This is particularly important if the overrun is a result of exceeding the authority's estimate based upon historic undertaker average durations. Authorities should not impose unreasonably short durations as each activity is unique but equally undertakers should also not apply ‘blanket durations’ for unique activities.

POWER OF DISCRETION TO WAIVE OR REDUCE CHARGES

It should be noted that section 74 overrun charges are avoidable; indeed the initial impact assessment on business that the Department for Transport (DfT) carried out in 2009 explicitly mentions the fact.

Undertakers should plan and manage their works effectively in line with their statutory duty to avoid unnecessary delay or obstruction on the highway. However, such circumstances may arise where undertakers can demonstrate that they have made genuine errors (and not repeated errors of the same type) and authorities should consider each situation on its own merit and the conclusions reached need to be based on all of the specific circumstances.

The applicable charges for section 74 overruns are set out in Tables 1 and 2 of the 2012 ‘amendment’ regulations (No. 2272). It should be noted these are maximum charges, as the authority has power under regulation 10 to reduce or waive charges as it sees fit and should exercise these powers of discretion reasonably.

Authorities must act reasonably when applying their powers and where they have not, their decisions may be liable to challenge. Therefore, authorities are strongly

recommended to develop procedures that will stand up to audit in terms of mitigation.

Undertakers should take all practical steps in ensuring that their compliance to the agreed durations and performance is recorded and available for discussion if continuing failure is identified by the authority. Undertakers that continually overrun agreed works duration are less likely to be considered for mitigation until their performance improves.

Key Point

Officers may be vulnerable if they simply agree without recourse to documented evidence. They will also need delegated powers to negotiate from their respective authority.

SUPPORTING EVIDENCE

In respect of street works it is considered that the best evidence is that of personal knowledge supported by documentary evidence e.g. photographs and works inspection reports.

Equally HAUC(UK) recommends that the works promoter takes photographs prior to works commencing and after completion so that a robust audit trail exists regarding reinstatement specification and site clearance.

Key Point

This is particularly important where an authority is applying the higher rate charge for carriageway as this will need to be supported with evidence, particularly in respect to the category of charge. Such evidence should include the time and date that the failure was resolved.

Section 59 of NRSWA requires authorities to use their best endeavours to co-ordinate works in relation to safety, inconvenience and the structure of the street and apparatus in it. This is reinforced by section 16 of the Traffic Management Act 2004 (TMA) which requires authorities to manage their road network having regard to the expeditious movement of traffic by undertaking a network management duty.

Section 60 of the New Roads and Street Works Act 1991 (NRSWA) requires undertakers to cooperate with authorities regarding safety, inconvenience and the structure of the street and apparatus in it. Where an authority has notified the undertaker of a failure and provided evidence of the failure, the undertaker should provide evidence that the failure has been addressed.

Both undertakers and authorities have a duty to act reasonably in fulfilling these statutory requirements. It should also be noted that adherence to section 59 is closely related to adherence with section 60.

PROCEDURE

The following scenarios are to assist authorities interpreting the changes within the chapter 10 revision of the Code of Practice for the Co-ordination of Street Works and Works for Road Purposes and Related Matters – Fourth Edition October 2012 (Co-ordination Code). Authorities should note the charge should be proportionate to the prevailing circumstances.

Scenario ONE (Incomplete reinstatements)

Scenario One refers to where the interim or permanent reinstatement has not been completed to the current “Specification for the Reinstatement of Openings in Highways” code of practice (SROH). A requirement for this scenario is defined within the SROH and standards must be met before the undertaker opens the highway fully to public use.

In these circumstances footnote 1 of Chapter 10 paragraph 10.9 of the Co-ordination Code states:

Where the undertaker gives a works clear or works closed notice when it has manifestly not made proper endeavours to complete the reinstatement (e.g. if no attempt has been made to replace road markings at least with temporary replacement markings in accordance with the Street Works (Reinstatement) Regulations 1992 and the Specification for the Reinstatement of Openings in Highways), then this may be treated as an overrun. However, if the undertaker has endeavoured to complete the reinstatement to performance specification but it is found on subsequent inspection to be defective, this should not be treated as an overrun for section 74 purposes.

Key Point

It is considered good practice to issue a section 74 overrun warning notification where either an interim or permanent reinstatement has not been completed. For example, a reinstatement can be considered incomplete if road markings (temporary or permanent) are still outstanding:

Consideration should be given to waiving or discounting charges where the missing road markings will have no or little adverse impact on traffic flows or where the original road markings are missing or indistinct.

It is strongly recommended that consideration be given by the authority to the gravity of the effects of a missing line (or part of a line). Lining such as parking restrictions (kerbside yellow lines or continuous white centre lines), Give Way or Stop lines offer a significant safety impact on the flow of traffic. Failure to reinstate such lines should be treated with the appropriate gravity. By comparison, lining such as part of a Cycle Lane emblem, or part of the wording of a Bus Stop, may have little or no impact on the function of that carriageway marking. **It is strongly recommended in these circumstances that consideration be given to a mitigated charge.**

Authorities are obliged under both their network management duty and NRSWA section 59 to ‘minimise the inconvenience to persons using of the street (having regard in particular to the needs of people with a disability)’. To this end the principles in the

section 74 regulations should be followed.

Upon discovery of missing road markings the authority is strongly encouraged to issue an overrun warning. The undertaker then has until the end of the next day, or the first allowable site day if a notice or permit is required, to replace the missing road markings to either interim or permanent standard.

Where an undertaker is required to serve notice or applies for a permit to carry out the remedial works on the day following the warning was given, authorities should consider applying a single day's overrun charge for each warning given. However, if the remedial works are not completed on the earliest allowable / available start date full charges may apply. Authorities should give reasonable consideration to approving requests for early starts if appropriate.

It is strongly recommended that undertakers and their contractors have the correct reinstatement materials available prior to commencing works. This will ensure that the highway is fully reinstated upon the completion of works to either interim or permanent standard within the agreed reasonable period of the notice / permit negating any need for an authority to consider applying section 74 charges.

Key Point

Furthermore it is considered good practice for the authority officer to question where these potential overruns sit in terms of the regulatory charge table in relation to the above examples.

Scenario TWO (Physical overstays)

Physical overstays relate to signing, lighting and guarding equipment (SLG) remaining on site and / or works that are still in progress; this scenario relates to where any part of the highway is still occupied.

In these circumstances the overrun would attract the full section 74 charges as defined within relevant tables. However, where an undertaker has completed works and moved their signing, lighting and guarding equipment to another part of the highway for later collection this does not necessarily fall under the mitigated charges but the authority may consider charging less than the maximum allowed..

Where an undertaker has completed works and moved their signing, lighting and guarding equipment off the public highway for later collection this does not constitute an offence under NRSWA.

Another situation to consider is when most signing, lighting and guarding equipment has been properly removed from the highway but **more than five items have been left behind in genuine error** then, in these circumstances, it may be reasonable to exercise even-handed discretion and reduce the daily charge.

Scenario THREE (Mitigating charges)

In order to qualify for the £100 mitigated charge under the arrangements of the new regulation 9, the following conditions would all have to be met:

- reinstatement (interim or permanent) has been completed; and
- all spoil, unused materials and other plant removed; and
- the undertaker has endeavoured to remove all signing, lighting and guarding. This means that most of the SLG from the works has been removed, but a few items have been inadvertently left behind in error; and.
- no more than five items remain on the highway

To qualify for the £100 mitigated charge the items must all be removed by the end of the next working day. If left beyond that period then the full charge could be applied.

Key Point

It is strongly recommended that any reduction of a charge should only be considered if the equipment is not left affecting either the carriageway or footway and that reasonable discretion has been exercised.

An example of where the mitigated charge could be appropriate is where a sign has been left as a result of a Temporary Traffic Regulation Order (TTRO) i.e. the undertaker has failed to collect a diversion sign placed on the alternative route required in the TTRO and this is shown to be a genuine error.

Note: HAUC (UK) is aware of disputes regarding uncollected signage relating to a TTRO being not chargeable under section 74. However, subsequently the DfT have not accepted this argument and it has not been included in the revised Co-ordination Code as an example of an exemption. Therefore any signing and guarding equipment irrespective of whether it is TTRO related or not, is part of the mitigated charging mechanism detailed in scenario THREE unless it relates to exempt works (see 10.3 in the Co-ordination Code).

DISPUTE RESOLUTION

Remember, it is up to the undertaker to provide the necessary evidence to rebut a charge (Leicestershire v Transco prosecution case refers). However, in the event that an issue has arisen that the authority is not able to resolve with the undertaker concerned, it is considered good practice to check with the JAG Community first, either through the regional JAG Chair or the JAG (UK) Manager, to see whether similar issues have arisen elsewhere or that support can be given to resolve the issue before following the Co-ordination Code Chapter 13 Dispute Resolution process. Undertakers should equally consult with NJUG for advice.

If the dispute cannot be resolved at local or regional level escalations should be made to HAUC England.

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