

**DETERMINATION BY THE SECRETARY OF STATE OF THE APPEAL OF
WIENERBERGER LIMITED**

And

THE ENVIRONMENT AGENCY

**Under the GREENHOUSE GAS EMISSIONS TRADING SCHEME REGULATIONS
2005**

Introduction

1. This document is a determination by the Secretary of State for Energy and Climate Change ('the Secretary of State') of an appeal under regulation 32(2) of the Greenhouse Gas Emissions Trading Scheme Regulations 2005 ('the Regulations'). The appeal was made by Wienerberger Limited against revocation notices in respect of permits under the Regulations for Sedgley and Cheadle brickworks served on the appellant by the Environment Agency.
2. The Secretary of State appointed David Hart Q.C under paragraph 4 of Schedule 2 to the Regulations to hear the appeal and make a report containing recommendations, or reasons for being unable to make recommendations, to the Secretary of State.
3. Mr Hart, after receiving initial written submissions, heard evidence on 6 December 2010. The appellant was represented by Mr Martin Edwards and the Agency was represented by Mr James Maurici. Further to a subsequent request by the appellant to make further submissions, and in accordance with a procedure agreed between the parties, Mr Hart allowed the service of further submissions from Weinerberger on 10 January 2011 and the Environment Agency on 21 January 2011. Mr Hart delivered his report, including recommendations, to the Secretary of State on 24 January 2011 ('the Report').

Conclusions of the Report

4. Mr Hart's Report sets out, in paragraphs 88 to 96, his conclusions on the appeal, followed by his recommendation. These are set out in full below:

"Conclusions

88. I conclude that the cessation of activities within Schedule 1 of the 2005 Regulations occurred when manufacture of ceramics ceased on 16 January 2009 for Sedgley and on 15 March 2009 for Cheadle, not when those works were in fact permanently closed (which I find to have occurred on 31 December 2009 in each case)

or indeed when the decisions were taken permanently to close those works (in November and December 2009 respectively).

89. The Regulations required that rationalisation applications be made within one month of the cessation of the manufacture of ceramics at Sedgley and Cheadle. This was because reg. 16(3)(b), and the time limit therein, is applicable to rationalisation applications.

90. The rationalisation applications in respect of Sedgley and Cheadle were made on 26 January 2010.

91. Those applications were out of time and hence invalid.

92. By reason of regs. 16 and 17(2), the Agency had no discretion to accept those applications out of time.

93. No legitimate expectation arose requiring the Agency to do anything other than reject those applications as being out of time.

94. The Agency was bound to revoke the permits, as it did, once it had ascertained that the applications were out of time.

95. These conclusions also lead to the conclusion that the notices of withholding should be upheld.

96. Were the ETS12 applications otherwise within time, I would not have decided that they were invalid and hence out of time because they were not accompanied by verifying opinions.

Recommendation

I therefore recommend that the Secretary of State dismiss Wienerberger's appeal against the revocation notices dated 30 April 2010 on the grounds set above."

Regulation 16(3)(a) – the one month period

5. In paragraphs 40 to 50 of the Report consideration is given to the question whether, in the context of regulation 16(3)(b), the period of one month runs from cessation of production at the beginning of a temporary closure or from permanent closure of production.
6. The Secretary of State agrees with the findings in the Report that the correct statutory interpretation is as contended by the Agency, that is to say, the one month period under regulation 16(3)(b) ran from the actual cessation of production activities, not the date that permanent closure was effected by the appellant.
7. The Secretary of State further agrees with the finding in the Report that the legislation does not fall into that residual category of cases where the intended purpose of the provision is plain but there is an obvious drafting error made by the draftsman which it is open to the Courts to correct.
8. The Secretary of State has, however, taken note of paragraph 50 of the Report where he is invited to consider whether the regulations, and in particular regulations 16(1) and 16(3)(b), should be amended so that the one month period for rationalisation applications runs from the cessation of activities or from the end of any period of temporary closure approved by the Agency, whichever be the later.

Determination of the Secretary of State

9. The Secretary of State agrees with and adopts the conclusions set out in paragraphs 88 to 96 of the Report.
10. In particular the Secretary of State agrees that regulation 16(3)(a) is intended to relate to temporary closures and regulation 16(3)(b) to rationalisations, and that there is therefore a time limit for rationalisation applications of one month from the cessation of Schedule 1 activities as provided for by regulation 16(3)(b) and the appellant was required to comply with this provision.

11. Furthermore, the Secretary of State agrees with the finding in the Report that the one month period under regulation 16(3)(b) ran from the actual cessation of production of activities. Accordingly, the Secretary of State agrees with the conclusions in paragraphs 51 and 52 of the Report that the expiry of the period allowed for rationalisation was 16 February 2009 for Sedgley and 15 April 2009 for Cheadle, and that the rationalisation applications, not being made until 26 January 2010, were out of time.
12. The Secretary of State also agrees with the finding at paragraph 57 of the Report that the Agency has no discretion to accept rationalisation applications out of time.
13. In determining the appeal the Secretary of State has the power under regulation 32(7) of the Regulations to affirm or vary the revocation notices. The Secretary of State considers that, due to the fact the appellant received no allocation of allowances in respect of the Sedgley and Cheadle sites during 2010 and 2011, the appellant should not be required to submit to the Agency a written report specifying the reportable emissions from the permitted installations at the above sites in relation to the period 1 January 2010 to 28 May 2010.

Determination

The Secretary of State therefore determines that:

- (i) the appeal by Wienerberger Limited against the revocation notices dated 30 April 2010 is dismissed on the grounds set out above and in the Report; and**
- (ii) the revocation notices dated 30 April 2010 are accordingly varied, by the deletion of paragraphs 1, 2 and 3 of the Schedule to each of those notices.**

Signed by:



Niall Mackenzie

Head, National Carbon Markets, Department of Energy and Climate Change,

for the Secretary of State for Energy and Climate Change
on the 19th day of April 2011