

Permitting decisions - Refusal

We have decided to refuse the permit for Whitehouse Field

The applicant is Nelson Plant Hire Limited.

The proposed facility location is Whitehouse Field, Winchester Road, Andover, Hampshire, SP11 7RN.

The permit application is for a Standard Rules 2015 No 39: Use of waste in a deposit for recovery operation. The waste deposit operation proposed the importation and use of 16,865 cubic metres of waste material for the construction and extension of a golf course, in line with the extant planning permission TVN6179/8, issued by Test Valley Borough Council.

We consider that in reaching that decision we have taken into account all relevant considerations and legal requirements.

Purpose of this document

This decision document provides a record of the decision making process. It:

- highlights [key issues](#) in the determination
- gives reasons for refusal
- summarises the decision making process in the [decision considerations](#) section to show how the main relevant factors have been taken into account.
- shows how we have considered the [Consultation](#) responses

Unless the decision document specifies otherwise, we have accepted the applicant's proposals.

Read the permitting decisions in conjunction with the refusal notice.

Key issues of the decision

Summary of our decision

We have decided to refuse the application for a Standard Rules environmental permit for the proposed deposit for recovery of waste at Whitehouse Field (the “site”) applied for by Nelson Plant Hire Limited (the “applicant”).

The application is refused on the grounds that the applicant has failed to demonstrate that the proposed activity would be a recovery activity and therefore they would not be able to comply with a permit restricting waste operations to recovery.

Multiple opportunities have been offered by the Environment Agency to extend the determination to review any additional evidence submitted by the applicant. However, the applicant has declined to submit further evidence and has indicated an intent to appeal to the Planning Inspectorate for non-determination if a decision had not been made by the 23 March 2023.

Site background

This application was for a Standard Rules Deposit for Recovery (SR2015 No.39 use of waste in a deposit for recovery operations). The waste deposit operation proposed the importation and use of 16,865 m³ of waste material for the construction of an extension to a golf course.

The application site is located approximately 910 m east southeast from the village of Goodworth, Clatford and is centred at approximately NGR SU 37333 41620. The site is accessed from the B3240 off the A3057 Winchester Road, located to the northwest of the site.

The immediate surroundings of the site largely comprise an agricultural setting to the south, east and west with a sewage works located approximately 210 m west of the site. The Hampshire Golf Club is located to the north of the site and an extensive area of woodland known as Upping Copse is located to the northeast of the site and extends approximately 3 km eastwards. The closest residential dwelling to the site known as Whitehouse Cottage is located approximately 330 m north and east of the site.

This application was preceded by environmental permit applications and appeals, involving both the Environment Agency and Test Valley Borough Council (“TVBC”). The application history and appeals have been considered in this determination.

Appeals brought by the applicant against TVBC were as follows:

1. APP/C1760/C/19/3220542, November 2019

- The appeal was against an enforcement notice issued by TVBC.
- The enforcement notice was in regard to the following:
 - Breach of the planning permission in that the ground level of the land had been raised above that which was permitted by the approved plans.

This appeal was dismissed and the enforcement notice upheld

2. APP/C1760/C/19/3220546, November 2019

- The appeal was against an enforcement notice issued by TVBC.
- The enforcement notice was in regard to the following activities without planning permission;
 - Formation of hardstanding on the land
 - Formation of bunds on the land.

This appeal was allowed and the enforcement notice quashed

The appeal brought by the applicant against the Environment Agency was as follows:

3. EPR/APP/548, January 2021

- The appeal was against the non-determination (deemed refusal) of environmental permit application ref: EPR/EB3803CU/A001, dated 13 June 2018.
- The main issues considered were;
 - whether the Pre-application advice was binding with regard to the determination of a subsequent permit application; and
 - whether the scheme represents a recovery operation.
- The appeal concluded that the pre-application advice was not binding, and the scheme could not be considered recovery with the information available at the time.

This appeal was dismissed and the application for the environmental permit was refused.

How we made our decision

In assessing proposals to permanently deposit waste on land we apply the legal definitions of waste 'recovery' and waste 'disposal' set out in the Waste Framework Directive (2008/98/EC). We are also assisted in assessing proposals by online guidance we have developed: 'Waste recovery plans and deposit for recovery permits' (amended 31 October 2022), available at:

www.gov.uk/government/publications/deposit-for-recovery-operators-environmental-permits/waste-recovery-plans-and-deposit-for-recovery-permits

Article 3(15) of the Waste Framework Directive defines 'recovery' as meaning:

“any operation the principal result of which is waste serving a useful purpose by replacing other material which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations”

Article 3 (19) defines 'disposal' as:

“any operation that is not recovery even where the operation has a secondary consequence the reclamation of substances or energy. Annex 1 sets out a non-exhaustive list of disposal operations”

Annex I of the directive includes, for example: “D1 Deposit into or on to land (e.g., landfill etc.)”. Annex II includes, for example: “R5 Recycling/reclamation of other inorganic materials”, which includes recycling of inorganic construction materials. The proposal for the site could potentially fall within D1 or R5. That being the case we are required to categorise the activity into one of the Annex I or II operations and to examine the principal objective of the operation and whether it meets the recovery definition.

For that definition to be met, the operator must clearly demonstrate that waste is being used in a genuine substitution for non-waste material, i.e., the proposed activity would go ahead with non-waste if waste could not be used.

As set out in the online guidance, we consider all the circumstances of a case when seeking to determine whether the activities would still go ahead even if they were not allowed to use waste. We consider appropriate evidence an applicant can provide that demonstrates it would, in fact, carry out its proposed works with non-waste.

Waste Recovery Plan assessment

As part of the application for the bespoke permit, the applicant submitted a Waste Recovery Plan for assessment (reference: Waste Recovery Plan V2 September 2021). The applicant did not make an application to the Environment Agency for a pre-assessment of the Waste Recovery Plan through the Environment Agency's Pre-Application Advice Service. It must be noted that there is no mandatory

requirement on an applicant to use the Environment Agency's Pre-Application Service.

In support of the application, the applicant provided a decision notice regarding planning permission for the site (reference: TVN.6179/8) that has been granted by Test Valley Borough Council on 25 November 1997. The planning permission granted the:

“Extension to golf course providing 5 additional holes together with associated ground works at OS Parcels 3974 and 3300, Hampshire Golf Club, Romsey Road / Winchester Road, Goodworth, Clatford”.

Other relevant supporting documents appended to the WRP were:

- Discharge of Condition 6 of Permission TVN.6179/8 (26.02.98)
- Obligation Letter (5.3.98)
- Obligation Letter (12.12.11)
- Previous RvD advice form, approving recovery
- Excerpt of Inspector's decision notice
- WYG's (now Tetra Tech) email to Ms. Stockton of the EA
- Ms. Stockton's email to Nelson's / WYG (now Tetra Tech)
- TVBC Enforcement Correspondence to Nelson's
- Environment Agency emails from Emma Bellamy
- Appeal Decision March 2021
- LPA email August 2021

Reference was made in the application to the statement made by the Environment Agency during the previous appeal under Regulation 31(1)(a) of the Environmental Permitting (England and Wales) Regulation 2016 (EPR/APP/548). Point 13 of the Decision Document for this appeal states that:

‘the EA accept that there is an obligation on the appellant to complete the works...’.

As part of the determination process, the Environment Agency wrote to the applicant, requesting them to provide further evidence, which was discussed at the appeal, that TVBC Planning Authority still considered the planning condition to be an obligation.

The information submitted the applicant failed to provide sufficient information for us to determine if the activity was a recovery operation. The Environment Agency consequently wrote to the applicant by emails dated 8¹, 17², and 29 September 2022³, for additional information to support the assessment. The applicant's responses did not sufficiently address the issues raised by the Environment Agency. On 9 November 2022 the Environment Agency issued a Notice to Request Further Information⁴ ("the Notice") under the provisions of Schedule 5 of the Environmental Permitting (England and Wales) Regulations 2016 ("EPR 2016") which requested more information from the applicant to support the application. In the Notice we asked the applicant to:

- Confirm if material has been placed on the site since Drawing Number MJ Rees 9026, dated April 2020 was prepared. If material has been placed on the site, please confirm how much additional material has been deposited on the site and how this material impacts the total volume required under the current Waste Recovery Plan.
- Provide clear evidence from Test Valley Borough Council Planning Authority, that the Planning Authority will only discharge the planning conditions once the site is restored to the agreed planning permission, and that the Planning Authority would not accept anything less than the volumes of material as stated in the Drawing 9026 dated April 2020.
- Provide evidence that the 'worthwhile benefit' to the works being carried out referred to in the original planning permission are still exist.

On the 21 November 2022 the applicant responded to the Schedule 5 Notice by email⁵ but the applicant's response failed to satisfactorily answer the questions set out in the Schedule 5 Notice. To-date, the questions on the Notice remain unanswered. Consequently on 21 November 2022 the Environment Agency

¹ Email from Matt Tanner, 'Whitehouse Field – Additional Information Required', sent 08/09/22

² Email from Matt Tanner, 'Re: Whitehouse Field – Additional Information Required', sent 17/09/22

³ Email from Matt Tanner, 'Re: Whitehouse Field – Additional Information Required', sent 29/09/22

⁴ Schedule 5 Notice issued on 9 November 2022

⁵ Email from Michael Jones, 'Re: Whitehouse Field – Additional Information Required', sent 21/11/22

initiated a consultation with Test Valley Borough Council in relation to the point raised in the second bullet point above.

TVBC indicated to the Environment Agency that they anticipated providing the Environment Agency with a response to the consultation by 20 January 2022. TVBC's response was delayed, as detailed below. In the meantime the applicant submitted additional correspondence in support of their application via email on the dates provided below:

- 26 January 2023⁶
- 30 January 2023⁷
- 1 February 2023⁸

From the information provided in the email the Environment Agency received on 1 February 2023, it became apparent that the applicant had chosen to directly correspond with TVBC in an effort to progress the application.

In correspondence from the applicant, the applicant made reference to a potential appeal for non-determination. In a letter⁹ dated 8 February 2023, the Environment Agency informed the applicant of the position regarding the application, and to outline all the available options for the applicant. The applicant responded to the Environment Agency's letter on 9 February 2023¹⁰ and again on 15 February 2023¹¹.

On 23 February 2023, TVBC provided a consultation response¹² to the Environment Agency regarding the planning condition.

On 23 February 2023, the Environment Agency attend at the site to review recent activity and consider what if any impact the activity may have on the volume of waste required to complete the works. The applicant was present on site and available for discussion. The most significant findings from the consultation and site visit were as follows:

- Both the Environment Agency and TVBC's investigations have independently confirmed with Hampshire Golf Course that there are no

⁶ Email from Simon Nelson, 'Re: Whitehouse Field – Schedule 5 Notification and TVBC Consultation', sent 26/01/23

⁷ Email from Simon Nelson, 'Re: Whitehouse Field – Schedule 5 Notification and TVBC Consultation', sent 30/01/23

⁸ Email from Simon Nelson, 'Whitehouse field.', sent 01/02/23

⁹ Minded to Refuse letter from Matt Tanner, dated 08/02/23

¹⁰ Email from Simon Nelson, 'Re: Whitehouse Field', sent 09/02/23

¹¹ Email from Simon Nelson, 'Re: Whitehouse Field', sent 15/02/23

¹² Consultation response letter from Andrew James of TVBC, dated 23/02/23

plans or agreement in place between the applicant and Golf Course to include an additional 5 holes in the golf course.

- Discussions have taken place between the applicant and TVBC regarding the possibility of the applicant developing the site as a stand-alone golf course rather than an extension. This would require a new planning permission application as the existing permission only allows for an extension associated with the adjacent Hampshire Golf Course.
- TVBC confirmed to the Environment Agency that in the absence of new planning permission then the development must be developed as an extension to Hampshire Golf Course and in full compliance with the associated planning conditions, drawings and other details that form part of the planning approval.
- The current position is that the extant Enforcement Notice remains unresolved and 'the council will need to consider its position in relation to the Enforcement Notice'.
- During a discussion on site on 23 February 2023 between the Environment Officer and the applicant, the applicant confirmed that a stand-alone golf course, rather than the currently approved extension, may be an option. The applicant has since informed TVBC that it is no longer their intention to apply for a stand-alone golf course.
- The Environment Agency is aware of new activity on site namely a new bund has been built along the southern side of the road or track, and the scraping of the internal side of the bund running along the northern boundary. The Environment Agency is unaware of any further volumes of waste which may have been brought to or removed from the site.

This additional information has raised further uncertainty in relation to the extent of the planning obligation and the volume required to carry out the work. This uncertainty justified the Environment Agency sending a revised letter¹³ on 1 March 2023 outlining the Environment Agency's position.

With the information we had received to-date, we have completed the assessment of the Waste Recovery Plan. The outcome of the assessment of the Waste Recovery Plan, and supporting information, was that the applicant has failed to provide sufficient evidence for us to be satisfied the deposit of waste would be a recovery operation. The applicant has failed to demonstrate that:

¹³ Minded to Refuse letter from Matt Tanner, dated 01/03/23

- **There is a requirement to carry out the works**
Planning permission allows an operator to carry out the work but does not require them to do it. While the planning permission allows the applicant to reach these levels, a lower profile may achieve the function of an extension to a golf course. We agree there is a requirement to carry out some work on site, as TVBC have indicated that they want the site restored to a satisfactory standard. The intimation from TVBC¹² is that the applicant is not obliged to restore the site to this plan necessarily, and a smaller volume may be agreeable. It is important that an applicant should have all necessary permissions in place before applying for a permit particularly when the applicant had placed reliance on an obligation in support of their application for a Recovery for Disposal permit. The applicant was requested by the Environment Agency to provide clarification from TVBC on the status of any outstanding planning conditions.

- **The minimum amount of waste will be used to achieve the intended benefit/function.**
As confirmed by TVBC, the April 2020 survey (Drawing 9026) calculated a requirement for 16,865 m³ imported to the site.

Since the survey in April 2020, the Environment Agency was made aware of the fact that material has been brought onto and removed from the site. This was also confirmed by the Environment Agency's recent site visit and from our discussions with the operator, we cannot be confident that the volumes referred to above are still required for the applicant to comply with the levels stated in the approved plans

Is the waste being used as a substitute for a non-waste material?

The proposed purpose of the work was to complete an extension to the golf course, in line with the plans agreed with the Planning Authority.

The applicant needed to demonstrate that if waste material could not be used, then the proposed scheme would be completed with non-waste materials to achieve the desired function. The applicant needed to explain how the volume of required waste had been calculated and justify why it would be the minimum amount of material required to complete the work.

Following the statement from the planning authority, we acknowledge that work is required onsite to restore the site to TVBC's satisfaction. Currently, the applicant is required to reach the levels agreed in in the original planning permission. It is unclear whether TVBC would be open to varying the planning conditions to allow the applicant to complete the scheme with lower levels and consequently less waste. If the applicant applied to vary the existing planning conditions or applied for new planning permission, then it would be open to TVBC to vary or grant

planning permission with lower levels thereby casting doubt on the applicant's argument that they have an obligation.

Under condition 8 of the current planning conditions, the applicant is required to have plans approved for a pedestrian crossing point on the B3420, to link the proposed extension to the existing golf course. When questioned, TVBC had no record of agreed plans for a pedestrian crossing.

The applicant has indicated that they seek to rely on enforcement notice as an obligation to import the waste. The Environment Agency does not accept that the applicant is under an obligation to specifically import waste. Although the local authority could and has taken action against the holder of the planning permission, these relate to the failure to discharge a condition and potential use of the land contrary to what was agreed. These do not make it more likely that non-waste would be used if waste were not available. If the applicant cannot prove recovery then the applicant has the option of either applying for a disposal permit or importing non-waste without an environmental permit.

It is also noted that the enforcement notice has been outstanding for a significant period and that there has been no further action by the planning authority with regards to enforcement. This begs the question whether TVBC intend to enforce on the notice.

For the application to be considered as a recovery activity, the applicant would have to justify the recovery test by other means, for example in terms of financial gain or other worthwhile benefit to show that they would still carry out the works using non-waste if waste was not available. The applicant has not provided any demonstration of financial gain or other incentive in the Waste Recovery Plan or other supporting documents in this application.

Is the recovered waste material suitable for its intended use?

The applicant needed to clearly show that the proposed waste types are physically, chemically, and biologically suitable for the works they are proposing.

The Waste Recovery Plan lists the waste codes to be received in section 3.3. These are in accordance with the waste codes allowed under the Standard Rules 2015 No 39: Use of waste in a deposit for recovery operation.

The applicant also failed to provide information where the different waste types would be used in the permitting scheme. Sufficient detail on this aspect was not provided. Accordingly, we were unable to agree that the proposed waste materials were suitable. In view of the discussions with the applicant regarding an obligation and the proposed waste volumes, this took precedence over the issue regarding the suitability of the waste materials. Consequently, this issue has not been addressed with the applicant.

Is the minimum amount of waste being used to achieve the intended benefit?

The waste recovery plan states that 16,865 m³ would be required to deliver the land levels shown in the approved plans for TVN.06179/8. This volume is based on the survey carried out in April 2020 (Drawing 9026). There has been site activity since then, with material being both imported and exported from the site. Some of this material has been imported under waste exemptions namely:

- A T5 exemption - WEX125952 which expired on 15 March 2021
And,
- A U1 exemption - WEX125952 which expired 15 March 2021.

When the Environment Agency questioned the applicant as to how the waste was to be used on site, the applicant stated the material would be removed from the site before reaching the final levels. If the waste material imported under a T5 or a U1 exemption was not to be included in the waste recovery operation, then the waste material imported under an exemption would have to be removed before a permit could be issued. It is unclear why this material is not contributing to the final levels, thereby reducing the volume required under a recovery operation. Consequently, we cannot be confident that the 16,865m³ is the minimum volume required to achieve the intended benefit.

As addressed in the previous appeal (EPR/APP/548) under point 19, the applicant was seeking to reassure the Environment Agency by stating that they would not place more waste than is necessary, and that there is no history of non-compliance. As stated in the appeal decision document, previous compliance is not a criterion in the Environment Agency's guidance to determine whether an operation is on of recovery, and we cannot base regulation on goodwill. This is particularly relevant when considering the trust that would be required to allow the applicant to remove exemption material after the permit has been issued.

Will the proposal be completed to an appropriate standard?

Sections 4.3.4 to 4.3.10 of the waste recovery plan outlines how the applicant intends to meet appropriate standards. In the formation of the extension to the golf course, the appropriate standards proposed are 'USGA Greens', and industry best practices. With the understanding that the original plans were appropriately designed, and appropriate standards are followed, this is sufficient for the construction of the extension of a golf course.

Summary of our decision

We acknowledge that there is a requirement on the applicant to restore the site in accordance with planning conditions. The applicant has failed to demonstrate that there is still an obligation to carry out the work as specified in the planning conditions. From the limited information provided by the applicant it is unclear as to how far that obligation still extends.

If there is some doubt as to whether is still an obligation to carry out the work as specified in the planning conditions, it is still open to the applicant supply evidence to meet the substitution test by other means, e.g. financial gain. However, the applicant has failed to provide any alternative evidence.

Insufficient evidence has been provided to demonstrate that the minimum amount of waste is being used to achieve the required levels. Consequently, we are not satisfied that the minimum amount of waste would be used to achieve the intended function.

Under Schedule 5, Part 1, paragraph 13(1) of the EPR 2016 it states:

Identity and competence of the operator

13.—

- (1) Subject to sub-paragraph (3), the regulator must refuse an application for the grant of an environmental permit or for the transfer in whole or in part of an environmental permit if it considers that, if the permit is granted or transferred, the requirements in sub-paragraph (2) will not be satisfied.
- (2) The requirements are that the applicant for the grant of an environmental permit, or the proposed transferee, on the transfer of an environmental permit (in whole or in part), must—
 - (a) be the operator of the regulated facility, and
 - (b) operate the regulated facility in accordance with the environmental permit.
- (3) The requirement in sub-paragraph (2)(b) does not apply to an applicant for the grant of an environmental permit authorising the carrying on of only a stand-alone water discharge activity, stand-alone groundwater activity or stand-alone flood risk activity.

We do not agree that this operation is a recovery activity and do not consider that the applicant's proposal meets the recovery test as defined in the Waste Framework Directive and outlined in the Environment Agency's guidance.

The permit applied for could not authorise the activities proposed as the applicant applied for a recovery operation not disposal. Therefore, the activities would not be operated in accordance with the permit applied for.

We must therefore refuse an application for a permit where we do not consider an applicant will operate in accordance with a permit. Consequently we refuse the application.

Decision considerations

Section 108 Deregulation Act 2015 - Growth Duty

We have considered our duty to have regard to the desirability of promoting economic growth set out in section 108(1) of the Deregulation Act 2015 and the guidance issued under section 100 of that Act in deciding whether to grant this permit.

Paragraph 1.3 of the guidance says:

“The primary role of regulators, in delivering regulation, is to achieve the regulatory outcomes for which they are responsible. For a number of regulators, these regulatory outcomes include an explicit reference to development or growth. The growth duty establishes economic growth as a factor that all specified regulators should have regard to, alongside the delivery of the protections set out in the relevant legislation.”

We have addressed the legislative requirements and environmental standards to be set for this operation in the body of the decision document above. The guidance is clear at paragraph 1.5 that the growth duty does not legitimise non-compliance and its purpose is not to achieve or pursue economic growth at the expense of necessary protections. This also promotes growth amongst legitimate operators because the standards applied to the operator are consistent across businesses in this sector and have been set to achieve the required legislative standards.

Consultation

The following summarises the responses to consultation with other organisations, and the way in which we have considered these in the determination process.

Responses from organisations

Response received from Test Valley Borough Council

Brief summary of issues raised:

- The Planning Authority expects the site to be restored in line with the existing approved plans.
- Any deviation, such as creating a stand-alone golf course, would require new planning permission to be sought.
- Currently there is no agreement between the applicant and the adjacent golf course that would indicate the activity is an extension rather than a standalone site.

- The extant Enforcement Notice is still unresolved, and the council would need to review its position in relation to the Enforcement Notice.

Summary of actions taken:

- The Environment Agency gained a statement from the Golf course, reiterating their previous statement.
- The site was visited to gain an understanding of recent activity and how this would impact the volumes required to reach the agreed levels.
- As shown in [key issues](#), the consultation provided a vital perspective on the expectations of the planning authority.