APP/EPR/630

APPEAL BY NELSON PLANT HIRE LIMITED

ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) REGULATIONS 2016

SITE AT: WHITEHOUSE FIELD, WINCHESTER ROAD, ANDOVER, HAMPSHIRE, SP11 7RN

HEARING STATEMENT ON BEHALF OF THE ENVIRONMENT AGENCY

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Section 1: Introduction

1. This is the Hearing Statement of the Environment Agency ("the Agency") in response to an appeal by Nelson Plant Hire Limited, company number: 05959053, ("the Appellant"). The appeal is made under the provisions of Regulation 31 of the Environmental Permitting (England and Wales) Regulations 2016 ("EPR 2016").

2. The Appellant is appealing the Agency's decision dated 22 March 2023, to refuse application reference EA/EPR/JB3307SP/A001, for a Standard Rules Deposit for Recovery activity (SR2015 No.39 use of waste in a deposit for recovery operations) at Whitehouse Field, Winchester Road, Andover, Hampshire, SP11 7RN ("the site").

3. The activity proposed under the permit was a deposit for recovery activity to import and deposit 16,865 m^3 of waste material for the construction of an extension to a golf course. The application site is centred at approximately NGR SU 37333 41620.

4. The Agency refused this application on the grounds that we were not satisfied that the proposed application would fall within the scope of the Deposit for Recovery Permit applied for and they would not be able to comply with the permit restricting waste operations to recovery. Under Schedule 5, Part 1, Paragraph 13 of the Environmental Permitting (England and Wales) Regulations 2016:

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.

The Agency was therefore required to refuse the application and issued a Refusal Notice[1] and Decision Document[2] both dated 22 March 2023.

Section 2: Comments on Appellants Statement of Appeal, dated June 2023

5. Following submission of the Agency's Statement of Case[3], the Appellant's Statement of Case was made available for further comment. The Agency does not agree with the Appellants statement and refutes the following points as outlined below.

Unless otherwise specified, the sections referred to below are as written in the Appellant's Statement of Case.

6. The third bullet point under 1.1.2 states that '*the Agency has previously issued 3 standard rules / exemptions on this site […] for the same operation'*.

- The previous exemptions are not for an equivalent activity (Standard Rules Deposit for Recovery). The Agency does not base the determination of any application on a favourable result of a previous application. Equally, we would not refuse an application based on the shortcomings of any previous application. We do not hold any record of a Standard Rules Deposit for Recovery activity authorised on this site.

7. The fourth bullet point under 1.1.2 states that '*the Agency have continually moved the determination date further and further back resulting in this latest application taking 2 years which is unprecedented'*.

- As outlined in paragraph 46 of the Agency's Statement of Case, extensions were agreed with the Appellant to provide additional time for the determination. Also outlined in paragraph 45, the application was processed from submission to decision, within 10 months.

8. 1.2.3 states the Agency '*changed their minds*' regarding the recovery decision.

- In paragraph 1.2.4 of the Appellants Statement of Case and addressed in paragraphs 11 and 12 of the previous appeal[4], pre-application advice is not binding on the determination of a subsequent permit application. In addition, the reassessment of the recovery decision under this application was part of

[1] Appendix 1 Refusal Notice, dated 22 March 2023
[2] Appendix 2 Decision Document, dated 22 March 2023
[3] Appendix 3 Environment Agency's Statement of Case, submitted 29 June 2023
[4] Appendix 4 Appeal Decision 18 March 2011 'Appeal Ref: EPR/APP/548'

the determination process, and all evidence, either historical or new, was requested by the Agency for its consideration. The evidence provided by the Appellant was found to be insufficient to prove obligation.

9. 1.2.7 refers to '*a considerable body of evidence from the LPA threatening further enforcement action'*.

    - As outlined in the decision document, and paragraphs 36 to 41 of the Agency's Statement of Case, the evidence provided is insufficient to prove that there is a specific obligation to undertake the works.

10. 1.3.3 refers to the Appellants obligation.

    - Please refer to paragraphs 8 and 9 above.

11. 1.3.4 refers to the Appellant responding to requests for information.

    - While the operator has responded to the Agency's questions throughout determination, the answers did not sufficiently address concerns to allow the permit to be issued.

12. The second bullet point of 1.3.5 refers to the Appellants claim to be using the minimum volume of waste.

    - This has been discussed in depth in previous documents, most notably paragraph 28 of the Agency's Statement of Case. The volume stated (16,865 m^3) may not be reflective of current site conditions, given that activity[5] on site appears to have occurred since the agreed survey[6] from April 2020.

    - Applicants for a deposit for recovery permit must also consider the reuse of suitable onsite materials as part of their application. The reuse of onsite materials reduces the requirement to import of waste. Material imported under the existing U1 exemption should therefore have been considered in the volume calculation. As per Sections 42 and 43 of the Agency's Statement of Case, and page 11 of the Decision Document, the applicant has failed to respond to this request to consider material brought in under the U1 exemption.

13. 1.3.6 highlights the Appellants intention to remove the material deposited under the exemption before the golf course is playable.

    - The Agency would not have the power to enforce this under a Standard Rules permit, and regulation cannot be based on goodwill. Also, as mentioned above, this onsite waste material could reduce the requirement for import of waste.

14. 1.3.7 refers to the discharging of the planning conditions.

    - As addressed in paragraph 47 and 48 of the Agency's Statement of Case, the refusal of the recovery permit does not stop the Appellant from completing the

[5] Appendix 5 Witness Statement from Phillip Kirby, dated 26 June 2023
[6] Appendix 6 Drawing Number MJ Rees 9026, dated April 2020

work through other means. The alternative to a Deposit for Recovery permit include a disposal permit or importing non-waste without an environmental permit.

15. 1.3.9 refers to the delay with consulting the Local Planning Authority.

    - The Agency had no control over this delay, and it was not '*held against the Appellant'*. The consultation response[7] was taken into account when deciding to refuse the permit.

16. 1.3.10 refers to there being no existing agreement between the Appellant and the adjacent golf course to extend the golf course.

    - Test Valley Borough Council have confirmed in the consultation response[6] that there was no agreement in place. This was also confirmed through the Agency's independent investigations[8]. While the Agency are not commenting on the requirement of this for discharging planning conditions, it does bring into question if the activity is serving a useful purpose, which is a key requirement to demonstrate that proposal is a genuine act of recovery.

17. 1.3.11 refers to the Agency's claims there have been discussions between the Appellant and the LPA regarding a standalone golf course.

    - As stated in paragraph 26 of the Agency's Statement of Case, the Agency were originally informed of these discussions in the TVBC Consultation letter response, and then in an email chain from the Appellant[9]. The Appellant has since informed TVBC and the Agency that their intention is to continue with the existing planning permission, as an extension to the golf course.

18. 1.3.13 refers to the deposits covered under the exemption and the removal of the material before the golf course is playable.

    - Please refer to paragraphs 12 and 13 above.

19. 1.3.14 refers to the volume of waste stated in the Waste Recovery Plan and the planning permission drawings being the same.

    - The Agency do not contest this point, but the volume stated is unlikely to be correct given activity observed at the site. This activity should have been taken into account by the applicant to demonstrate the case that this is a genuine recovery operation. Please refer to paragraphs 12 and 13 above.

20. 1.3.16 refers to the Appellant demonstrating minimum waste.

    - Please refer to paragraphs 12 and 13 above.

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[7] Appendix 7 Consultation response letter from Test Valley Borough Council, dated 23 February 2023
[8] Appendix 8 Statement from the manager at the Hampshire Golf Club dated 3 March 2023
[9] Appendix 9 Email from Simon Nelson, sent 04 March 2023

21. 1.3.17 refers to the Agency '*Prejudicing the Appellant's commercial position*'.

    - Please refer to paragraph 14 above.

22. 1.3.18 refers to the Appellant's belief that '*the Agency and LPA are working together to try and stop this operation going ahead'.*

    - The Agency is within its rights to consult with various authorities, including LPAs, who advise the Agency on certain aspects of environmental permit applications. The advice is considered when deciding if a permit should be issued. The LPA was consulted on their expectations of the site and likely enforcement action. The Agency do not encourage or discourage any enforcement action by TVBC.

23. 1.3.19 is not understood, and we request the Appellant clarify this paragraph.

24. 1.3.20 refers to the expectation of the Agency to remove material brought in under the exemption.

    - The Agency do not have this expectation; only that the material brought onto site since the volume was agreed with TVBC is considered in the calculations. It is an Appellant's responsibility to provide the final volume required and, as stated above, this figure has been brought into doubt.

25. 1.3.21 refers to the volumes calculated from the survey, and cross referenced in the Waste Recovery Plan. This paragraph also welcomes the Agency to check the levels at any time.

    - Please refer to paragraph 19 above.

    - It is not the responsibility of the Agency to calculate the volume of material required to achieve the final levels as set out under planning. Given that the volume stated has been calculated based on the April 2020 survey, and that material import and export has been carried out on the site since this date, it is likely that the volume would have changed.

26. The third bullet point of 1.4 refers to the minimum amount of waste.

    - Please refer to paragraph 12 and 13 above.

27. The fifth bullet point of 1.4 refers to the Agency's previous agreement of obligation.

    - The Agency agree there is an obligation, but the extent of this obligation is not clear. Although the applicant is obliged to comply with the conditions of the planning permission, we do not consider that this represents a specific obligation to undertake the works such that they would proceed with non-waste if waste was not available.

28. The seventh bullet point of 1.4 refers to the LPA's enforcement notice.

    - Please refer to paragraph 14 above.

29. 1.4.1 refers to operation being '*a recovery operation and not a disposal operation and the facility would be operated in accordance with the environmental permit'*.

    - As concluded in the Decision Document and the Agency's Statement of Case, the Appellant has failed to satisfactorily demonstrate that they would be able to comply with the proposed operations for the standard rules permit they have applied for.

30. 1.5.1 refers to the Agency's '*duty regarding the desirability of promoting economic growth'*, and decisions on historical applications.

    - The Agency growth duty does not legitimise non-compliance and its purpose is not to achieve or pursue economic growth at the expense of necessary protections.

    - Please refer to paragraphs 6 and 8 above.

31. 1.5.2 states '*the Appellant has met all of the criteria*'.

    - Please refer to paragraphs 8, 9, 12, 16, 19, 25 and 27 above.

32. 1.5.2 refers to the Agency's '*unreasonable behaviour and prolonged behaviour'*.

    - As described in paragraphs 44 to 46 of the Agency's Statement of Case, the application was processed from submission to decision within 10 months. When considering the length of the Agency's work queue and statutory deadlines, this is considered in line with other applications.

    - Extensions were agreed with the Appellant to authorise the additional time. Delays would have been avoided had the Appellant engaged substantively with the Schedule 5 Notice. The Appellant either would have obtained the necessary evidence to satisfy the Agency that the proposed operation truly amounts to recovery, or the Appellant would have chosen to withdraw its application.

    - The Agency had remained fair and professional in their role as the competent regulator and made all reasonable efforts to consider all information for the determination of the application.

33. 1.5.3 refers to the Agency's '*unreasonable behaviour'.*

    - Please refer to paragraph 32 above.

34. 1.6.1 states that '*the Agency are prejudicing the Appellant's commercial position and leaving them open to enforcement action by refusing to grant a permit'.*

    - Please refer to paragraphs 14 and 30 above.

35. 1.6.2 refers to the deadline to commence to appeal.

- Throughout determination, extensions were agreed with the Appellant to authorise the additional time. The Appellant was within their rights to not provide any further extensions to the determination and confirmed a final date of the 23 March 2023. At this point the Agency worked to provide a comprehensive Decision Document, which considered all available evidence, to avoid a lengthy appeal for non-determination of the application. Through determination, the Agency were clear with their assessment as it progressed, and the potential decisions regarding the application were formally communicated through various correspondence to the applicant[10, 11].

36. 1.6.3 refers to the Appellant seeking costs for the appeal.

    - The Environment Agency has incurred wasted expense in participating in this appeal as a result of the Appellant's unreasonable behaviour. The appeal would have been avoided had the Appellant engaged substantively with the Schedule 5 Notice. The Appellant either would have obtained the necessary evidence to satisfy the Agency that the proposed operation truly amounts to recovery, or the Appellant would have chosen to withdraw its application. In either scenario this appeal and the expense the Agency has incurred in responding to it, would have been avoided.

    - For the above reasons, if this appeal is upheld, the Environment Agency will respectively invite the Inspector is respectfully invited to grant the Environment Agency its full costs in responding to this appeal.

37. Section 2.1 refers to the application history prior to the submission of this application. This includes the original planning permission, previous appeals, pre-application advice and applications.

    - While these historical correspondences have been considered in the most recent application determination, the Agency reviewed decisions made to ensure that all statements were up to date and in line with our existing guidance.
    - Please refer to paragraphs 6 and 8 above.

38. Section 2.2 refers to the Appellants account of the recent application submission.

    - Some dates listed throughout this section are incorrect. Please refer to paragraph 44 of the Agency's Statement of Case for key milestones on record for the application.

Section 3: Conclusions

39. As outlined in Section 2 of this Hearing Statement, the Appellant has submitted a false account of the Agency's determination. The Agency has acted within its remit as a

[10] Appendix 10 Environment Agency Letter, dated 08 February 2023
[11] Appendix 11 Environment Agency Letter, dated 01 March 2023

competent authority with regard to the environmental permit application made by the Appellant on the 09/05/2022.

40. 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.

41. The Agency has explained in this statement, the Agency's Statement of Case and the refusal Decision Document why the permit was refused. It is our opinion that there is nothing submitted in the appeal documentation that alters this conclusion and we consider the appeal should be dismissed.

Section 4: List of Appendixes

- Appendix 1 Refusal Notice, dated 22 March 2023
- Appendix 2 Decision Document, dated 22 March 2023
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