

APP/EPR/630

THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES)
REGULATIONS 2016 REGULATION 31

APPEAL BY: Nelson Plant Hire Limited

SITE AT: Whitehouse Field, Winchester Road, Andover,
Hampshire, SP11 7RN

Hearing Statement on behalf of the
Environment Agency

Introduction

- 1 This is the Environment Agency's Hearing Statement in relation to an appeal by Nelson Plant Hire Limited ("the Appellant") against the Environment Agency's refusal to allow the Appellant's application for an environmental permit for the 'Standard Rules 2015 No 39: Use of waste in a deposit for recovery operation' ("the permit").
- 2 On 22 March 2023, the Environment Agency issued a Refusal Notice¹. The reasoning underpinning the refusal is summarised in the accompanying Decision Document².
- 3 The application was refused as the Environment Agency was not satisfied that the site would operate in compliance with the Standard Rules as laid out for SR2015 No 39 and would be in immediate breach of the conditions set within.

Legal Framework

4. The Waste Framework Directive 2008/98/EC – Article 13 ("Article 13 WFD") sets out certain objectives that need to be met. Waste must be recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

- without risk to water, air, soil, plants and animals,

¹ Appendix 1 Notice of Refusal dated 22 March 2023

² Appendix 2 Decision Document dated 22 March 2023

- without causing a nuisance through noise or odours,
- without adversely affecting the countryside or places of special interest.

5. The Environment Agency (“The Agency”) exercises this function through paragraph 3 of Schedule 9 of the Environmental Permitting Regulation 2016 (“EPR 2016”) which states:

‘Exercise of relevant functions

(1) The regulator must exercise its relevant functions—

(a) for the purposes of ensuring that—

(i) the waste hierarchy referred to in Article 4 of the Waste Framework Directive is applied to the generation of waste by a waste operation.

(ii) waste generated by a waste operation is treated in accordance with Article 4 of the Waste Framework Directive.

(b) for the purposes of implementing Article 13 of the Waste Framework Directive, but not in respect of nuisances and hazards arising from traffic beyond the site of a waste operation.

(c) so as to ensure that the requirements in the second paragraph of Article 23(1) of the Waste Framework Directive are met.

(d) so as to ensure compliance with the following Articles of the Waste Framework Directive—

(i) Article 18(2)(b) and (c);

(ii) Article 23(3);

(iii) Article 23(4);

(iv) Article 35(1).

(2) But the following duties take effect in relation to an environmental permit which was in force on the date of coming into force of the Waste (England and Wales) Regulations 2011(1) on the first review of the permit by the regulator (under regulation 34(1)) after that date

(a) the duty in sub-paragraph (1)(a), (d)(i) and (d)(iii);

(b) the duty in sub-paragraph (1)(c), to the extent that it is imposed in relation to Article 23(1)(e) and (f).’

Standard Rules Permits

6. There are 3 levels of complexity for regulation the simplest being Waste Exemption, then Standard Rules Permitting and rising to the most complex which is Bespoke Permitting.

7. Regulation 26 of the Environmental Permitting Regulations 2016 provides for the production of standard rules. Regulation 26 states:

‘Preparation and revision of standard rules

26(1) A rule making authority may prepare standard rules for such regulated facilities as are described in those rules.’

8. Standard rules permits are easier to apply for than a bespoke permit as they are appropriate for activities and in locations where a generic risk assessment and standard conditions can be relied on to protect the environment. Each type of standard rules permit is based on a set of rules (different rule sets for different permitted activities) for which generic risk assessments have been undertaken with specific mitigations to address any environmental risks associated with the activity.
9. According to the Progress update on implementation of the Penfold review of non-planning consents³

“Standard rule sets and permits allow a simplified and light-touch procedure for regulating simple activities for which the risks and means of controlling them are readily defined”.
10. Generic risk assessments have been devised for a number of regulated facility types that share similar characteristics where a good understanding of the hazards and risks posed by these low to medium risk activities already exists. Consequently, the operator of a standard rules permit would however require a far greater level of knowledge surrounding the relevant legislation and the hazards and risks posed by these low to medium risk activities than an operator working within the terms of a waste exempt activity.
11. Whereas in determining applications for bespoke permits, alternative controls may be proposed to address any site-specific risks identified, which in this instance could address the absence of a building and presence of existing waste deposits.
12. Schedule 5, Part 1, paragraph 13 of the EPR 2016 states:
 - (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

³ Appendix 3 Progress update on implementation of the Penfold review of non-planning consents, May 2011
<https://www.gov.uk/government/publications/implementing-non-planning-consents-review-penfold-update>

(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.

13. Consequently, in accordance with our duty under Schedule 5, Part 1, paragraph 13 of the EPR 2016, the Agency considers that it must refuse the application.

Application History

14. 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 were considered in the determination process but are set out below for reference.

15. Appeals brought by the Appellant against TVBC were as follows:

- APP/C1760/C/19/3220542, November 2019
 - The was an appeal against an enforcement notice issued by TVBC.
 - The enforcement notice was issued by TVBC with regards 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

- APP/C1760/C/19/3220546, November 2019
 - The appeal was against an enforcement notice issued by TVBC.
 - The enforcement notice was issued in regard to activities which were carried out without planning permission;
 - Formation of hardstanding on the land
 - Formation of bunds on the land.

This appeal was allowed and the enforcement notice quashed

16. The Appellant's previous appeal against the Environment Agency was as in relation to:

- 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 regards 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.

17. Prior to this application, the Appellant submitted a request for pre-application advice to ascertain whether the operation would be considered recovery or disposal. As presented in the Agency's Advice letter⁴, dated 02 August 2021, the Agency's assessor concluded that:

'We do not agree with your assessment that your activity is a recovery operation'.

18. It was made clear at the time of the application for pre-application advice that the pre-applicant may still apply for a recovery permit, however if the applicant was unable to provide further evidence that supports the claim that the activity is a recovery operation, then the application was likely to be refused.
19. On 09 May 2022, the Appellant applied for a permit. Once allocated to the Permitting Officer, the conclusions of the pre-application advice were reaffirmed to the Appellant, but the Appellant opted to proceed with the application on the clear understanding that the Appellant risked losing the application fee if the operation was still not found to be recovery.
20. The extant planning permission in question (reference: TVN.6179/8) was granted on 25 November 1997 for the "Extension to golf course providing five additional holes together with associated ground works at OS Parcels 3974 and 3300, Hampshire Golf Club, Romsey Road / Winchester Road, Goodworth, Clatford".
21. On 17 August 2022, the application was duly made. The Decision document⁴ outlines the details of the proposal, which is to operate a Deposit for Recovery operation under standard rules SR2015 No 39, to increase the profile of the land to align with plans agreed with TVBC.
22. Following the application being duly made an assessment was made of the Waste Recovery Plan, dated September 2021, in line with our Guidance⁵. As a result of the assessment, the Agency concluded that additional information was required to complete the assessment. To request this information the Agency

⁴ Appendix 4 Recovery for Disposal Advice Letter dated 2 August 2021

⁵ Appendix 5 Environment Agency (Updated 31 October 2022),
[Waste recovery plans and deposit for recovery permits - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/waste-recovery-plans-and-deposit-for-recovery-permits)

issued a Notice issued under Schedule 5⁶ of the EPR 2016. The outstanding information related to the following points:

- Requesting clarification of the volume required to complete the works, given the understanding that there had been recent site activity that may influence the remaining void space.
 - Requesting justification that the volume to be stated was the minimum amount of waste to achieve the specific function, and that TVBC would not accept anything less than the volume stated.
 - Requesting evidence that the ‘worthwhile benefit’ to the works being carried out was still present given the disassociation with Hampshire Golf Club.
23. The Appellant’s response failed to answer the questions set out in the Schedule 5 Notice. Consequently, on 21 November 2022 the Environment Agency initiated a non-statutory consultation with Test Valley Borough Council with a view to seeking additional information.
24. While waiting for the response from TVBC, the Appellant provided additional information in support of their application^{7,8,9}. During the course of providing the additional information to the Agency, the Appellant made clear reference to a potential appeal for non-determination. Consequently, the Agency wrote to clarify the position and to inform the Appellant of the available options.
25. On 23 February 2023, TVBC provided a consultation response¹⁰ to the Environment Agency regarding the planning condition. On the same day, the Environment Agency attended 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 Appellant was present on site and available for discussion.
26. As outlined in the Decision Document, the most significant findings from the consultation and site visit were as follows:
- There are no plans or agreement in place between the Appellant and Hampshire Golf Course to include an additional 5 holes in the golf course.
 - Discussions have taken place between the Appellant and TVBC regarding the possibility of the Appellant developing the site as a stand-alone golf course rather than an extension. This would require a new planning

⁶ Appendix 6 Notice issued under Schedule 5 of the EPR 2016 dated 9 November 2022

⁷ Appendix 7 Email from Simon Nelson sent on 26 January 2023

⁸ Appendix 8 Email from Simon Nelson sent 30 January 2023

⁹ Appendix 9 Email from Simon Nelson sent 01 February 2023

¹⁰ Appendix 10 Consultation response letter from TVBC, dated 23 February 2023

permission application as the existing permission only allows for an extension associated with the adjacent Hampshire Golf Course. These discussions were referred to in the consultation response from TVBC and again in an email chain sent by Nelson Plant Hire on 04 March 2023¹¹.

- 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, addressed in APP/C1760/C/19/3220542, November 2019, 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 Appellant, the Appellant confirmed that a stand-alone golf course, rather than the currently approved extension, may be an option. The Appellant¹² has since informed TVBC that it is no longer their intention to apply for a stand-alone golf course.
 - No activity was witnessed during the site visit by the agency, but the Agency is aware of recent activity on site namely a new bund has been built along the southern side of the haul road¹³ and the scraping of the internal side of the bund running along the northern boundary. The Environment Agency is unaware of the precise volumes of waste which were brought onto the site or the total volumes of waste which may have been removed from site¹³.
27. With the receipt of the consultation response, the Appellant confirmed via email dated 02 March 2023, that they would not agree to any further extensions to the determination and requested the Agency’s decision by 23 March 2023. Failure to provide a decision would have led to the Appellant commencing an appeal of non-determination. Therefore, the Agency proceeded to provide a Decision Document and Refusal Notice on the 22 March 2023 based on the information available.

¹¹ Appendix 11 Email from Simon Nelson sent 04 March 2023

¹² Appendix 12 Email from Simon Nelson sent 15 September 2022

¹³ Appendix 13 Witness Statement from Phillip Kirby, dated 26 June 2023

The Environment Agency's position

28. The application was refused as the Environment Agency was not satisfied that the proposed activity would be a recovery activity and therefore the Appellant would not be able to comply with a permit restricting waste operations to recovery. The justification for not being considered a recovery operation is outlined in the decision document. This can be summarised in the following points:

- The Agency disagrees with the Appellant's assertion that the enforcement notice issued by TVBC in relation to the Appellant's failure to discharge planning conditions and the outcome of the appeal referred to above as APP/C1760/C/19/3220542 represent an obligation on the Appellant to complete the works. The enforcement notice has been outstanding for a significant period of time and that there has been no further enforcement action taken by the planning authority. Consequently, this raises the question as to whether TVBC intend to carry-out any enforcement on the notice. TVBC have stated that they are considering their position in relation to the enforcement notice. After receiving the notice of appeal, the Agency made further enquires with TVBC to ascertain whether TVBC were intending to take any further enforcement action following the permit application refusal. TVBC refused to confirm this point.
- The 'worthwhile benefit' of the original planning application was based on an extension to the golf course. Based on information that:
 - The information the Agency received in relation to a proposed extension to the golf course
 - A statement from TVBC,
And
 - The results of investigations conducted by the Agency

The information confirmed that there is no agreement between the Appellant and Hampshire Golf Club to extend the course. Consequently, the Appellant has failed to demonstrate a 'worthwhile benefit'.

- As highlighted in the 2021 appeal, it was essential that clarification was sought regarding the volume of material required to carry out the work. Before making an application for an Environmental Permit, the Appellant and TVBC agreed a value of 16,865m³ of additional material was needed to complete the scheme. Material had already been brought to site which was the subject of an enforcement notice issued by TVBC and discussed previously at the appeals (APP/C1760/C/19/3220542 and APP/C1760/C/19/3220546). The agreed volume of waste required to reach the levels is outlined in the agreed drawing (Drawing Number MJ Rees 9026, dated April 2020) which forms part of this application (EPR/JB3307SP/A001). The Agency understands that there has been further importation and exportation of waste from the site¹³ since the

Appellant and TVBC agreed on a value of 16,865m³ so it is unclear if this figure was still required. In response to the Schedule 5 Notification, the Appellant had offered to remove the haul road bund material prior to the golf course opening. Under the Standard Rules permit, the Environment Agency would not have the authority to force the Appellant to remove any additional material which was deposited under the exemption. As established in the previous appeal, regulation cannot be based on goodwill.

- Alternatively, it is unclear why the material brought on to site cannot contribute to the final levels, thereby reducing the volume required under a recovery operation.

29. The Agency believes that it has operated in accordance within the limits of statutory legislation and within the Agency's internal and external guidance and processed the Appellant's submission with reasonable and fair consideration.

The Environment Agency's comments on the Appellant's Grounds of Appeal

30. In addition to the points covered above on the Appellant's grounds of appeal, the following is a response to the Appellant's grounds of appeal, specifically referred to in their appeal statement considering the various points of contention.

Ground of appeal 1 – Obligation:

31. We refute the Appellant's statement that:

"It has been determined that we have an obligation to undertake the work".

32. As part of the determination of this application, the Agency have concluded that the Appellant has failed to provide sufficient evidence for us to be satisfied the deposit of waste would be a recovery operation.

33. The Appellant has stated they hold obligation to carry out the work, on the basis that:

- (a) The conclusions of the previous appeal, EPR/APP/548¹⁴.
 - (b) The enforcement notice served on the Appellant by TVBC¹⁵.
- And
- (c) The possession of planning permission, TVN.6179/8¹⁶.

¹⁴ Appendix 14 Appeal Decision 18 March 2011 'Appeal Ref: EPR/APP/548'

¹⁵ Appendix 15 Letter from Head of Planning TVBC dated 12 December 2011 /12/11

¹⁶ Appendix 16 Notice of full planning permission by Test Valley Borough Council, ' dated 25 November 1997

34. In the decision document for the appeal brought by the Appellant against the Environment Agency (EPR/APP/548, January 2021), it states that:
“the EA accept there is an obligation on the Appellant to complete the works to fulfil planning permission ref: TVN6179/8”.
35. The Appellant also mentions historical discussions with the Agency which refer to having an obligation. The extent of the obligation had not been confirmed in either the:
- Appeal Decision Document
 - In any correspondence from the Agency
- Or
- Independently.

Although the Appellant is obliged to follow planning, we do not accept that the phrasing in the Agency’s previous appeal Statement, was meant to imply that there is a specific obligation on the Appellant requiring them to use non-waste if waste was not available.

36. The reassessment of the recovery decision was part of the determination process and all evidence, either historical or new, was requested by the Agency for consideration. The evidence provided by the Appellant was found to be insufficient to prove obligation. Consequently, the Appellant was given a further opportunity to provide any additional evidence. Whilst there is an obligation on the planning permission holder to comply with the conditions set out within said permission, it does not follow that the obligation means they would complete the works with non-waste if waste was not available, or would face enforcement action if the works were not completed
37. The Environment Agency does not accept that the Appellant is under an obligation to complete the outstanding works by importing waste. The Appellant could comply with the planning conditions by importing non-waste. Although the local authority could and has taken enforcement 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. The planning conditions do not prohibit the Appellant using non-waste if waste were not available.
38. The enforcement notice has been outstanding for a significant period and there has been no further action undertaken by the planning authority with regards to enforcement. This has been discussed with TVBC as part of our extended consultation.
39. As noted in point 18 in the previous appeal against the Environment Agency, EPR/APP/548, January 2021, the Agency cannot rely on the Local Planning

Authority to take enforcement action if it was necessary, despite the Local Planning Authority's interest in the site which continues.

40. In Test Valley Borough Council's consultation response, TVBC confirmed that the extant Enforcement Notice remains unresolved and:
'the council will need to consider its position in relation to the Enforcement Notice'.
41. Planning permission allows an operator to carry out the work but does not require them to do it. In cases which planning permission are used to indicate obligation, the Agency look at the extent to which the local planning authority was directly involved in the design of the scheme when they granted the planning permission and imposed the condition, and whether the local planning authority would be likely to agree anything significantly different. No evidence was provided that indicated TVBC had imposed this design on the Appellant, and through consultation it has been proven that TVBC may agree a lower level.

Ground of appeal 2 – Minimum volume:

42. The volume stated in the application - 16,865 m³, was based on Drawing Number MJ Rees 9026, dated April 2020. The Appellant admits there has been further activity on site which would alter the existing profile. This would mean that under current conditions, the volume required to reach the agreed profile may be different. While the Appellant states that any temporary deposits would be removed before the golf course is playable, standard rules permits do not allow the Agency to include bespoke conditions, and the removal of waste offsite is not a permitted activity. Any material deposited under a U1 exemption remains waste but is not subject to directive waste controls.
43. In view of export and import of waste on site, doubt has been cast as to whether the value of 16,865 m³ of material (established by the survey undertaken in April 2020) is the minimum volume required to achieve the desired function.

Ground of appeal 3 – Application determination timeline:

44. The Appellant has expressed dissatisfaction with the prolonged progress of the application; stating that the latest application has taken 2 years to come to a decision, with wider application discussion being held in excess of 5 years. While discussions may have been held over this time, these are not considered within our statutory timescales. Discussions held prior to this application were part of previous applications or pre-application advice. For clarity, outlined below are the key milestones on record for the application:

- 09 May 2022 Application Submission
- 15 August 2022 Application allocated to permitting officer

- 17 August 2022 Application duly made
- 08 September 2022 Initial Request for Information via email
- 09 November 2022 Request for information via a Notice issued under Schedule 5 of the EPR 2016
- 21 November 2022 Response to Schedule 5 Notification
- 21 November 2022 Request for TVBC consultation sent
- 08 February 2023 First Environment Agency Letter
- 23 February 2023 Response from TVBC consultation received
- 23 February 2023 Environment Agency attended the site
- 01 March 2023 Second Environment Agency Letter
- 22 March 2023 Application Determination Decision
- 04 May 2023 Appeal submitted

45. As demonstrated above, the application was processed from submission to decision, within 10 months. After considering the Agency's application and the length of the work queue, the time taken to consider this permit application is considered in line with other applications, and not 'prolonged excessively' as stated by the Appellant.

46. It should be noted that a duly made application requiring external consultation should be determined within 4 months. This application was determined within 8 months, which is outside the statutory deadline. However, extensions were agreed with the Appellant^{9,17, 18, 19} to authorise additional time.

Ground of appeal 4 – Refusal of the permit is stopping Appellant from discharging the enforcement notice:

47. The refusal of a recovery permit does not stop an applicant from completing the work through other means. If they cannot prove recovery, then the applicant has the option of either applying for a disposal permit or importing non-waste without an environmental permit.

48. The conditions of the enforcement notice issued by TVBC that have not been discharged and are separate to the consideration to the environmental permit application. If the Agency were minded to consider the planning system and subsequently enforcement notices as part of the determination process for a recovery permit, then this could place an inappropriate burden on Local Planning Authorities and undermine the ability of the Environment Agency to

¹⁷ Appendix 17 Email from Michael Jones, sent 06 December 2022
¹⁸ Appendix 18 Email from Simon Nelson, sent 15 February 2023
¹⁹ Appendix 19 Email from Simon Nelson, sent 01 March 2023

effectively enforce the environmental permitting regime. Therefore, the line of argument is not relevant.

Conclusions

49. For the reasons set out above, the Environment Agency considers that 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. As outlined in paragraph 3 above this would immediately put the Appellant in breach of the standard rules permit they applied for. For this reason and the reasons set out in detail above, we would respectfully ask the Planning Inspector to dismiss the appeal.