The Planning Inspectorate

Appeal Decision

Hearing held on 27 January 2021

by Jonathan Manning BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 March 2021

Appeal Ref: EPR/APP/548
Whitehouse Field, Winchester Road, Andover, Hampshire, SP11 7HW

- The appeal is made under Regulation 31(1)(a) of the Environmental Permitting (England and Wales) Regulations 2016.
- The appeal is made by Nelson Plant Hire Limited against the non-determination (deemed refusal) by the Environment Agency of environmental permit application ref: EPR/EB3803CU/A001, dated 13 June 2018.
- The proposal is to use waste in a deposit for a recovery operation.

Decision

1. The appeal is dismissed and the application for a standard rules environmental permit is refused.

Costs Applications

2. An application for costs has been made by both main parties against each other. These will be the subject of a separate decision.

Procedural Matters

3. It was agreed by the main parties at the Hearing that due to the nature of the case, a site visit was not required. I agree with this view and therefore, I have not undertaken a site visit.

4. The appellant has raised strong concerns with regard to the handling of the permit application and the conduct of the Environment Agency (the EA). These matters are considered where relevant in the appellant's costs decision.

Main Issues

5. As a result of the evidence before me and the discussions that took place at the Hearing, I consider that the main issues of the appeal are:

   - whether the Environment Agency's pre-application advice is binding with regard to the determination of a subsequent permit application; and

   - whether the scheme represents a recovery operation.

Reasons

Background

6. In June 2018, the appellant submitted an application for a standard rules environmental permit for the use of waste in a deposit for a recovery

operation. This would involve the deposition of waste to construct 5 golf holes associated with planning permission ref: TVN6179/8.

7. The EA failed to determine the permit application within the statutory timescale and on 23 October 2018, the appellant served a notice of deemed refusal on the EA. The appeal was submitted on 1 November 2018.

8. Following the submission of this appeal, the Planning Inspectorate received an appeal by the appellant against an enforcement notice served by Test Valley Borough Council (the LPA). This related to an alleged breach of planning control associated with planning permission ref: TVN6179/8. Given the close links with this appeal it was put into abeyance whilst the enforcement appeals[1] were concluded. The enforcement appeals decision was issued on 13 January 2020. The appellant requested that this appeal be taken out of abeyance on 18 September 2020.

Whether the Environment Agency's pre-application advice is binding?

9. The appellant requested pre-application advice for the proposal in April 2018. On 8 June 2018, the EA wrote to the appellant stating that based on the information provided, including Waste Recovery Plan Version 2 (WRP v2) the proposal was a recovery operation. Following this advice, the appellant submitted the application for the environmental permit.

10. During its consideration of the application, the officers considering the application became aware that waste had been deposited on the site in the past and contacted the LPA for more information. The LPA confirmed that they were concerned about the level of waste that had already been deposited on the site by previous owners. The EA now consider that the operation is not recovery. Such matters will be discussed later in this decision.

11. Notwithstanding this, the appellant is of the view that the pre-application advice is binding on the EA. However, at the Hearing the appellant was unable to refer to any regulations or guidance that set this out. Further, the pre-application letter from the EA clearly states in bold writing: '*Please also note that following submission of an application, additional assessment will take place (for example, further assessment of the proposed waste types based on the sensitivity of the site location) and therefore agreement that an operation is a recovery activity does not guarantee that a permit will be granted or a variation issued*'.

12. The appellant maintains that nothing has changed about the proposal to warrant a change in view from the EA. However, I accept the EA's view that matters associated with the enforcement appeals, particularly that it now appears far less waste is required to complete the works, is a material change in circumstances and is, in my view, sufficient grounds to justify the EA taking a different view. Given all of the above, I do not consider that the pre-application advice is binding on the determination of a subsequent permit application.

A recovery operation?

13. The EA accept that there is an obligation on the appellant to complete the works to fulfil planning permission ref: TVN6179/8, which the LPA are evidently

[1] APP/C1760/C/19/3220542 & APP/C1760/C/19/3220546

keen to see completed. It was established at the Hearing that the EA's only concern relates to the level of waste that is needed to complete the works.

14. WRP v2 sets out that 60,000 cubic metres of waste would be needed to complete the works. At the time of providing the pre-application advice, the EA saw no reason to consider that this was not the required amount. However, during the EA's consideration of the permit application and as set out above, concerns were raised about the levels of waste that had already been deposited on the site. Following the outcome of the subsequent enforcement appeals, it was established that works were not complete, and more material was needed to complete the construction of the golf holes. Although from the evidence before me and as accepted by the appellant at the Hearing, it is likely that much less waste is likely to be needed than the sought 60,000 cubic metres.

15. The EA guidance on waste recovery, which I afford significant weight, sets out that evidence will be needed to demonstrate that only the amount of waste needed to carry out the function, that would otherwise be provided by non waste, would be used. Further, the introduction to the relevant standard rules permit[2] states: '*You must submit a waste recovery plan with your application for these standard rules. We will only be able to issue a permit if we approve the plan and compliance with the approved plan will then be a requirement of the permit, if the application is granted. The plan must demonstrate that your proposals will meet the definition of recovery in the Waste Framework Directive 2008 as explained in relevant regulatory guidance*'.

16. The EA stated at the Hearing that if a robust calculation for the amount of waste required to complete the necessary works was put before them, they would very likely issue a recovery permit, as they accept there is an obligation to undertake the works. However, the amount of waste required in this case remains somewhat unclear from the evidence before me. The LPA are of the view that it is in the region of 16,000 cubic metres. The appellant's final comments are accompanied by a plan that estimates 24,500 cubic metres, but it appears that the appellant has moved away from this plan following further email exchanges with the LPA that have been provided to me. What is clear is that the evidence suggests that significantly less waste is required to complete the works than the sought 60,000 cubic metres in the permit application.

17. The appellant, although acknowledging that they are applying for more waste than is likely to be needed, seeks to rely on the fact that only the quantity of waste to reach the required levels in the enforcement plan can be deposited on the site, otherwise it would face further enforcement action from the LPA and this will in effect ensure it is a recovery operation. The proposed approach would remove the ability of the EA to ensure the operation was one of recovery and regulate it as such.

18. I am not of the view that it is appropriate to rely on the planning system, a separate regime, to ensure that the proposal is one of recovery and remains so. I do not consider that the LPA can be relied upon to take enforcement action if it was necessary, despite their interest in the site to date. For example, as set out by the LPA, it may require agreement by its Councillors, who may choose not to take action. It could be that the LPA's resources are focused on other enforcement matters. I also accept the EA's view that

[2] Standard rules SR2015 No.39.

enforcement action might not be taken if any breach was minor or had limited environmental harm.

19. The appellant also maintains that there is no evidence to suggest that more waste than is necessary to complete the works would be deposited on the site, as there is no history of past non-compliance. Whilst I accept that the appellant has not been formally cautioned in the past for non-compliance, this does not overcome my fundamental concerns with regard to the reliance on the planning system, as set out above, whether a breach of the permit is considered potentially likely or not. Further, the past compliance record of an operator is not a criterion in the relevant EA guidance to determining whether an operation is one of recovery. In addition, and in my view, a regulatory regime cannot be based on goodwill.

20. Whilst not a determinative factor given my above findings, I am nonetheless mindful of the precedent that such an approach of relying on the planning system to ensure and regulate that operations are one of recovery could set. Should other operators wish to follow a similar route, this could place an inappropriate burden on LPAs and undermine the ability of the EA to effectively enforce the environmental permitting regime.

21. Given all of the above, without robust evidence to set out how much waste is needed to complete the works and a waste recovery plan to reflect this quantity, I simply cannot conclude that the proposals will meet the definition of recovery in the Waste Framework Directive 2008[3], as any waste deposited over the required amount to complete the works would be classed as disposal. WRP v2 can therefore not be approved or a standard rules environmental permit issued.

Conclusion

22. For the reasons set out above and having regard to all other matters raised, the appeal is dismissed and the application for a standard rules environmental permit is refused.

Jonathan Manning

INSPECTOR

[3] Retained EU Law – Directive 2008/98/EC

APPEARANCES

FOR THE APPELLANT:

David Pojur	of Counsel
Michael Jones	White Young Green
Simon Nelson	Appellant

FOR THE ENVIRONMENT AGENCY:

Jack Smyth	of Counsel
Guy Price	Environment Agency
Justyna Krawczynska	Environment Agency
Nigel Oliver	Environment Agency

INTERESTED PARTIES:

Paul Jackson	Test Valley Borough Council