

Mr Anthony Watts
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Dear Anthony

**Response to Schedule 5 (notice of request for more information)
Sweethayes Farm, London Road, Hurst Green, TN19 7PS**

Background

We write for and on behalf of Laci Land Restoration Limited ("Laci"). Laci has been in pursuit of an Environmental Permit for its project since October 2020. Since then, its submissions have been dealt with by a number of officers, and you are the latest. The applicant feels utterly let down by the Environment Agency (EA). It has made formal complaints, including to James Bevan, your Chief Executive. But the process just goes on.

We open with a quick recap on the documents comprising the application bundle, and the logic taken by the applicant in responding to the EA's requests.

October 2020. On, or around, 29 October 2020 Laci's Agent applied for a waste recovery environmental permit (EP). It was a submission that included both a Waste Recovery Plan (WRP) and the documents comprising the EP application. The EA raised various questions, progress became intractable.

May 2021. The applicant instructed Waterman to take the application over. Waterman (on behalf of the applicant) repackaged the application bundle, reusing as much of the material as possible, amplifying, clarifying and extending the work in order to resolve the areas of dispute. Waterman adopted the two-stage approach advocated by the relevant Guidance¹: 1) seek pre-application approval of the WRP and, if obtained; 2) apply for the recovery EP.

Approval of WRP

Waterman submitted the WRP on 2 September 2021. On 19 November 2021 the EA reverted to Waterman asking:

- *"Please provide a comprehensive breakdown of what exactly the non-waste product is, and all of the costs associated with it."*

In response Waterman provided an update to the WRP by means of an addendum report – issued in the form of a Briefing Note (BN)². On **14 January 2022** the EA approved the WRP, with its letter³ stating it comprised the following documents:

¹ "You should send your waste recovery plan to the Environment Agency **before you apply for a permit**. They will tell you if they agree that your proposed deposit will be a recovery operation", quoted from [Waste recovery plans and deposit for recovery permits - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/waste-recovery-plans-and-deposit-for-recovery-permits).

² Briefing Note ref: WIE18431-100-BN-3.1.2-AddWRP, Waterman, December 2021.

³ EA ref: EPR/KB3706MB/A001, dated 14/01/2022.

- 1) Waste Recovery Plan, Sweethayes Farm, August 2021, Document reference: WIE18431-101-R-2.2.2-WRP;
- 2) Email from Beth Lyon of Waterman Infrastructure & Environment Ltd received on 22/10/21 at 14:21;
- 3) Waste Recovery Plan Review – Sweethayes Farm Briefing note, December 2021, Document reference: WIE18431-100-BN-3.1.2-AddWRP.

Upon approval the principle that the activity would be recovery was therefore settled.

Application for recovery EP

On **10 February 2022** Waterman applied for the recovery EP. The EA placed the application in a queue.

Prior acceptance of waste

On **30 May 2022** waste was accepted into the site⁴. Of itself, the acceptance of material - prior to obtaining an EP - did not change the scope of the project. It was instead that there had been a misstep in the required sequence of events to obtain a recovery EP.

Redressing the prior acceptance

On **9 November 2022** you wrote to the applicant⁵ explaining it needed to demonstrate compliance with the substitution test, specifically that:

- “...it would be hypothetically possible... to remove the tipped waste, dispose of it in the correct manner and the [sic.] re-import non-waste to complete the scheme”.

It would have been around this time that the applicant took up its cause more fully within the EA's complaint mechanism, pursuing answers, including as to the seemingly never-ending bureaucracy, not to mention the frustration of being held in a perpetual queue.

During **August 2023** the applicant submitted a fourth document:

- 4) Waste Recovery Plan Review - Sweethayes Farm Briefing note, August 2023, Document reference: WIE18431-100-BN-3.4.1-AddWRP.

This document:

- analysed the requested off-site disposal scenario;
- demonstrated a return to profit at year 16;
- showed that the proposals still appear reasonable.

For the avoidance of doubt the applicant's submission now consists of documents (1) to (4) inclusive. Therefore, read all four documents as a whole. The purpose of the submission remains as originally stated in the August 2021 report (document (1)). Likewise, as clarified by document (2), as amplified by document (3), as further amplified by document (4). The EA must consider the applicant's proposal as submitted. For the avoidance of doubt, the principle of the proposal remains unaltered.

As for the material accepted into the site⁴. Assume all material is removed. Assume as per document (4), notably at paragraphs 2.4, 2.5, 2.6 and 2.7. As for effects on the economics of the proposal assume as per conclusions of document (4).

⁴ Duty of Care information provided to Adrian Redfern, EA on 26 September 2022.

⁵ Email (Anthony Watts, EA to Steven Kilmartin, Laci) 9 November 2022.

Since all material accepted into the site would be removed – consider the site reverting to original state – the quantum of material required to complete the works therefore remains as stated in document (1). Likewise, all drawings as submitted in document (1) remain the drawings to rely upon.

The Schedule 5 Notice

To facilitate a structured response, we break the EA's request into the bullets below:

- a) provide a revised Waste Recovery Plan which covers only the import of waste required to complete extant planning permission RR/2019/724 issued by Rother District Council;
- b) the Waste Recovery Plan must consider the reuse of existing waste material imported to the site to complete the works as well as what existing material has been imported to site complete the works associated with the extant planning permission;
- c) where necessary you must provide revised cross sections and topographical survey to demonstrate the balance of material required to complete the scheme. Where revised cross sections and surveys are not provided in your response you must provide an adequate justification for their omission.

Response

The applicant demonstrates above that the principle of the scheme remains unchanged. The applicant has updated the WRP as requested. The EA must move to approve the WRP, in essence it is no different from before, and is on the same basis as before⁶.

As to matters of Town and Country planning. These are matters falling within the ambit of planning authorities, not the EA. The applicant notes your email⁷, and the partial rehearsal of the EA's Guidance⁸. It is noted you say:

- *“any applicant must notify the Environment Agency how the development is authorised in planning terms. This is to give the Environment Agency confidence that the scheme as described in the Waste Recovery Plan could be delivered in full using non-waste if waste was not available. This requirement also constrains the scope of the project in terms of what has been agreed with the relevant local planning authority.*
- *In order for us to move forward with the determination of your permit application we require you to explain how the extant planning permissions held for the site tie in with the proposals as described in your Waste Recovery Plan and supporting addendum.”*

However, that portrayal presents an incomplete picture. Not least because the Guidance (which is not law) provides for cases where planning permission may not yet be in place. You will note the Guidance says:

- *“If a project does not yet have planning permission, you must include alternative evidence of this in your waste recovery plan.”*

The Guidance goes on to explain that in such cases “*alternative evidence*” may be put forward. And it goes on (under the heading “Additional information you may need to include in your waste recovery plan”) to provide examples where such evidence may exist. It cites things such as: “Purpose of the work”; “Quantity of waste used” and “Meeting quality standards”. The applicant has done all this already, and, as you will know it has already obtained approval of the WRP submitted with the EP application in February 2022.

⁶ Save for addressing the misstep.

⁷ Email (Anthony Watts, EA to Steven Kilmartin, Laci) 27 September 2023.

⁸ [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)

Besides, looking at this logically, would it not be perverse not to provide a mechanism for prospective projects? Projects where a party wants to know if recovery is a possibility? And if it is, to then take that project forward. And isn't that prospective approach (where the prospects are evaluated at pre-application stage) in complete sympathy with arrangements advocated at footnote (1)?

With respect to the Schedule 5, and the bullet points we notate as (b) and (c). Given that the applicant undertakes the reversion of its misstep no response beyond the above is required.

"Duly Made"

We now turn to procedural matters. Specifically, when an application is "Duly Made" and the implications of that. It seems there is a somewhat flexible approach being employed in this case, which is favourable to the EA and to the disbenefit of the applicant. You will know, an application is "Duly Made" at the point it contains all the information that a regulator needs to make a determination. Plainly, that is factual test. It will either be Duly Made, or not Duly Made.

And, of course, the determination period begins the day on which a Duly Made application is received⁹. Not the point at which the EA decided that an application was Duly Made. So, the factual test remains the key test here: it either has, or has not been, Duly Made.

So, reviewing this applicant's treatment:

- 1) on 10 February 2022 it submitted a WRP (comprising documents (1), (2) and (3)) along with EP application forms etc. Its application was put in a queue. Weeks, then months passed by. The EA never assessed whether it had been Duly Made;
- 2) during August 2023 the applicant submitted a WRP (comprising documents (1), (2), (3) and (4)) along with the same EP application forms etc as before. It was confirmed as Duly Made on 25 August 2023.

Bearing in mind that on 10 February 2022 the applicant had not accepted material into the site (the misstep) it is clear that its application was not materially different from the revision submitted in August 2023. Therefore, on payment of the fee, it should have been declared as Duly Made. Thus, triggering the Statutory determination period, and also invoking the applicant's right to appeal non-determination at the expiry of that period. The EA cannot simply disclaim its obligation to deal with Duly Made applications. Quite the contrary, it is under a duty to determine them. Failing to discharge that duty has serious impacts – and possibly amounts to nonfeasance.

Plainly, in delivering any project, the applicant is under certain obligations. For example, such as the quality of the material it intends to use, and the timescale. In turn, the applicant has obligations to its client. But obligations also bear down upon the EA. For example:

- the duty to determine duly made applications¹⁰; and
- the statutory time limits for determination¹¹.

So, for the project to proceed in a managed way all parties must play their part. From what we can see the EA has been absent.

⁹ [Environmental permitting: Core guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/100231/environmental-permitting-core-guidance.pdf).

¹⁰ Environmental Permitting (England and Wales) Regulations 2016, SI 2016/1154 (EPR 2016), schedule 5, part 1, paragraph 12(1).

¹¹ EPR 2016, schedule 5, part 1, paragraph 15(3)(d).

It is our sincere hope that the waste recovery plan can now be considered to be approved, and that the EA turns its attention to determining the application. I look forward to hearing from you.

Yours sincerely



Matt Mehegan
Technical Director
For and On Behalf of Waterman Infrastructure & Environment Ltd