
Daneshill Landfill Site

**APPEAL PURSUANT TO REGULATION 31 OF
THE ENVIRONMENTAL PERMITTING
(ENGLAND AND WALES) REGULATIONS 2016**

**REGARDING DANESHILL SOIL TREATMENT
FACILITY
AT DANESHILL LANDFILL SITE**

**ON BEHALF OF FCC RECYCLING (UK)
LIMITED**

APPELLANT COMMENTS ON EA RULE 6

[All abbreviations used in the Appellant's Grounds of Appeal and Statement of Case are adopted and used for consistency herein]

Introduction

1. This document comprises the Appellant's comments on the Statement of Case submitted by the Environment Agency ("the EA").
2. It is not intended to be a full rebuttal of the Environment Agency's case in the Appeal and the absence of a direct response to any point made by the EA in its Statement of Case ("the EA's SoC") should not be read as an agreement to the same.
3. The Appellant's full response to the EA's case will be set out in its evidence to the Inquiry.
4. The Appellant considers that the EA has failed to fully particularise its case in the EA SoC and accordingly, the Appellant remains unable to understand the basis for the EA's decision to refuse to grant a permit for the activities which relate to the treatment of Asbestos Contaminated Materials ("ACMs") including waste soils.
5. In addition to providing comments on the EA SoC, this document addresses the third-party representations which have been submitted as part of the Appeal process to date. Again, the absence of a comment to a third-party representation should not be taken as an indication that the Appellant agrees with any such representation. The Appellant's full case on all issues will be set out in full in its evidence to the Inquiry, in accordance with the usual approach for appeals that are to be determined by Public Inquiry.

Corrections/Errata

6. The Appellant has noted that there are some minor inconsistencies within the appeal documents relating to the distances from the Appeal Site to sensitive receptors. The differences are accounted for due to the location at which measurements were taken to and from.
7. In particular, the AQIA undertaken by Airshed, which was submitted in support of the Application¹ ("the AQIA"), provided distances from the receptors from the centroid of the proposed (and approved) biofilter rather than from the closest point of the Site boundary to the receptors.

¹ Dated 2 March 2020

8. The Appellant's team has reviewed the previous data and checked the distances between the boundary of the Site and the receptors, utilising the boundary details as provided on Caulmert drawing reference 3982-CAU-XX-XX-DR-1805 Rev P2.
9. The distances from the closest point on the Site boundary to each of the receptor points set out below are therefore as follows:

No.	Description of Receptor	OS GR Xm	OS GR Ym	distance (m)
1	Travellers Site 1	467591.30	386492.80	169.3
2	Travellers Site 2	467698.80	386492.80	167.2
3	Daneshill Cottages	467050.00	386592.00	430.5
4	Loundfield Farm 1	468136.20	386659.70	470.6
5	Loundfield Farm 2	468230.00	386636.00	566.9
6	Tudorstone Building Materials	467725.30	386374.85	288.1
7	Tomlinson Family Settlement	467311.00	386327.00	393.9

10. A full reconciliation of all distances between the Site and nearby receptors will be provided in the Appellant's evidence.

Request for Information to be provided by the EA

11. The Appellant has been unable to locate and/or access:
 - 11.1 EA Guidance Document:
 - 11.1.1 The document referred to by the EA which is said to supplement Sector Guidance EPR S5.06 and which is said to be called: "Hazardous Waste Soil Treatment". The EA refer to this document in its Decision Notice and in the EA SoC;
 - 11.1.2 The Appellant requests that the EA made available a copy of this document to it by immediate return.
 - 11.2 Documentation submitted by third parties:
 - 11.2.1 At the application stage, a third-party response reference 649434312 ("the Response") was received by the EA;

11.2.2 The EA's website provides a copy of the Response. However, the Response refers to other documents which were submitted alongside it but these are not publicly available and have not been separately provided to the Appellant by the EA;

11.2.3 The Appellant therefore requests that the EA make available to it a full copy of all attachments/appendices/supplementary documents which accompanied the Response by immediate return.

Response to EA SoC

Overarching Comments

12. The Appellant is both surprised and disappointed at the EA's decision to include allegations of supposed illegal operations within the EA SoC².
13. Firstly, such allegations are extremely inflammatory and do not have any probative value in determining the issues which are in dispute in this Appeal. Such statements are highly prejudicial and entirely inappropriate. Raising such allegations in this way constitutes unreasonable conduct.
14. Secondly, the allegations are entirely incorrect. All treatment of ACMs within waste soils at ERQ took place in accordance with a temporary mobile treatment licence. Full details of the installation permit for ERQ were cited on the relevant deployment forms for the mobile installation so as to inform the EA that these temporary works would be taking place at an existing permitted facility. The deployment was approved by the EA on 6 May 2022 under reference EB3636AK/W0027 and all ACM related activities were carried out in accordance with that approval.
15. The Appellant invites the EA to formally withdraw such allegations forthwith.
16. Furthermore, the Appellant notes that some 10 pages of the EA SoC³ is dedicated to what can be fairly described as a partisan and ill-judged criticism of the information submitted to the EA, by the Appellant, during the application process.

² See paragraphs 131, 132, 199 and 200 of the EA SOC

³ Paragraphs 36 to 112

17. The Appellant does not consider that any of the procedural issues raised by the EA in this part of the EA SoC are in any way relevant to the main issues for determination in the Appeal. However, they may be relevant to costs and will be responded to in due course. The Appellant will respond, to what it considers to be unwarranted and unjustified criticism by the EA in this part of the EA SoC, as part of the evidence it submits to the appeal.
18. The Appellant contends that the EA has failed to fully particularise its case in its SoC, instead relying on a plethora of generalised assertions, which are unsupported by any technical evidence from suitably qualified experts. The Appellant reserves the right to respond fully to these points in its evidence and make further submissions/issue rebuttals in the event that the EA seeks to expand its case outside of the scope of its SoC.
19. The Appellant reserves the right to make an application for its costs of the appeal to be paid by the EA, on both substantive and procedural grounds. In accordance with the usual procedures, advance notice of the grounds to be pursued by the Appellant's proposed costs application will be submitted in due course.

Regulator Initiated Variation of the Maw Green Permit

20. The Appellant notes that its application for treatment of ACMs within waste soils at Daneshill was entirely consistent with that made for precisely the same type of operation at its Maw Green site. Prior to this Appeal being made, no criticism of the information provided in respect of the Maw Green application was made by the EA and the permit for those operations was granted by the EA.⁴
21. The EA has now, by way of a regulator-initiated variation dated 5 October 2023, partially revoked the Maw Green Permit ("the Varied MG Permit"). In summary, the revocations mean that ACM related activities, which were in July 2023 deemed acceptable by the EA 'as applied for' and which were to be undertaken outdoors, will now be required to be subject to further limitations and conditions which, in essence, require the relevant activities to be 'enclosed'.
22. As referenced in paragraph 6.13 of the Appellant's Grounds of Appeal, it now could not be clearer that the EA has adopted an erroneous and unjustified interpretation to BAT14 which requires all ACM related activities proposed by the Appellant to be undertaken inside a building and additionally requiring the proposed screener and handpicking line to be "fully enclosed". It is important to note that the Appellant expects the EA to contend that the enclosure of the

⁴ See the Appellant's Statement of Case at paragraphs 9.1 – 9.5.

screeener and/or handpicking line within a building would be insufficient to comply with the requirement for these activities to be 'enclosed' as per the wording of the Varied MG Permit.

23. The Appellant has already made submissions to the Inspector, by email dated 16 October 2023⁵, with respect to the EA's failure to comply with the requirements of the Environmental Permitting (England and Wales) Regulations 2016 in connection with the Varied MG Permit. It should be noted that the EA did not provide a copy of its Decision Document to the Appellant when the Varied MG Permit was issued to it by cover letter dated 5 October 2023. The Appellant requested the EA to furnish it with a copy of the Decision Notice which was subsequently provided under cover of email dated 10 October 2023.
24. It is clear from the Appellant's Grounds of Appeal and Rule 6 Statement, that prior to the Varied MG Permit, the Appellant sought to rely on the EA's decision to issue the Maw Green Permit in support of its appeal.
25. The Varied MG Permit will be appealed by the Appellant, with an application being made for that appeal to be conjoined with the extant appeal.

Varied Daneshill Permit

26. The Appellant notes that the EA has issued a regulator-initiated variation of the Daneshill Permit, with the varied permit having been issued on 29 September 2023 ("the September Daneshill Permit").
27. The Appellant was provided with a draft (under cover of letter dated 1 August 2023 to its registered office) and was invited to make limited comments on the proposed variation, prior to the September Daneshill Permit being issued by the EA. The September Daneshill Permit is identical to the draft previously provided to the Appellant by the EA.
28. The September Daneshill Permit grants permission for ACM related activities to be undertaken by the Appellant subject to the same conditions as have now been imposed on the Varied MG Permit.
29. The Appellant has already made submissions on this issue to PINs as follows:

⁵ Copy attached at Appendix One

- 29.1 By email dated 8 September 2023⁶ to confirm that the EA's proposed variations to the Daneshill Permit (which are now encapsulated within the September Daneshill Permit) would not resolve the issues in dispute in this appeal;
- 29.2 By email dated 16 October 2023⁷, with respect to the EA's failure to comply with the requirements of the Environmental Permitting (England and Wales) Regulations 2016 in connection with the October Daneshill Permit.
30. The EA is specifically requested to provide full disclosure of the steps it took to ensure that public consultees, who have made direct representation to this extant appeal, have been consulted and that the responses of those consultations were taken into account by the EA prior to the issue of the September Daneshill Permit.
31. The September Daneshill Permit will be appealed by the Appellant, with an application being made for that appeal to be conjoined with the extant appeal.

Detailed Comments on the EA SoC

32. At paragraph 29 of the EA SoC, the EA directly acknowledges that it has permitted sites to use the same type of enclosed picking stations for the treatment of ACMs and expressly acknowledges that there "is some risk of fibre release from handpicking". This demonstrates the internal inconsistency in the EA's case. The Appellant will address this issue in detail, as part of its evidence to the Inquiry, by reference to examples (available in the public domain) of other permits granted by the EA for ACM related treatment activities at installations.
33. Paragraphs 73 to 76 of the EA SoC are entirely irrelevant to the issues in the appeal and should be treated as redacted or withdrawn by the EA.
34. At paragraph 117⁸ of the EA SoC it is stated that, "There is no safe level of asbestos fibres in the environment and no safe level of human exposure". The Appellant notes the apparent lack of consistency in the EA's approach to asbestos as compared to other "non-threshold" substances such as some chlorinated solvents, benzene, lead and PM_{2.5}. The Appellant will address this issue in detail in its evidence in order to demonstrate that the EA is both misunderstanding and mis-applying the precautionary principle. The EA has adopted a position in respect of the risk of any level of asbestos fibres (no matter how low the levels of exposure

⁶ Copy attached at Appendix Two

⁷ Copy attached at Appendix One

⁸ Which is used for illustrative purposes; the point is raised in several paragraphs in the EA's SoC.

are) which is not justified by the well-established scientific evidence which is able to assess and identify the magnitude of health risk posed by specified exposure levels to asbestos. The Appellant will demonstrate that any emissions which would be generated by the Proposed Activities would not result in any **significant** risk of pollution.

35. At paragraph 141, the EA SoC again repeats its assertion that there is “no safe level of asbestos”. The EA takes this point even further at paragraph 183 of the EA SoC, stating that it, “considers there is an extreme degree of risk...”. The EA has provided no technical or expert evidence in support of its assertions in this respect. In adopting this approach, the Appellant contends that the EA has not had any or due regard to the risk-based management philosophy that underpins UK chemical and environmental regulation. The Appellant will address the magnitude of risk which arises from the Proposed Activities, having regard to extensive technical data and a comprehensive review of the relevant technical guidance, studies and scientific research which has been undertaken to date. The Appellant will demonstrate that the EA has adopted a sensationalist approach to the risks that may be posed by the Proposed Activities, which is not supported by the available evidence and well-recognised assessment methodologies for determining the same.
36. At paragraph 200 of the EA SoC, the EA alleges that the Appellant’s arguments rely on monitoring evidence obtained from a site which, “is completely enclosed”.⁹ This is incorrect on the facts. The data which the Appellant has obtained from the monitoring of activities at the Maw Green site relates to activities which were undertaken in ‘open’ conditions and which were carried out consistently with the Appellant’s operating procedures for the Proposed Activities at Daneshill. The Appellant will, as part of its evidence, also refer to data obtained at its ERQ site and will contend that this data remains relevant to the assessment of risks arising from the Proposed Activities. Furthermore, the Appellant will provide a full review of the EA’s stance (and all relevant correspondence between the Appellant and the EA on this issue) in respect of the attempts undertaken by the Appellant to comply with the EA’s interpretation of the requirement to achieve ‘full enclosure’ of the screener at ERQ in connection with ACM related activities.

Appellant’s Comments on Representations made by Third Parties

37. The Appellant has carefully reviewed all of the representations submitted by Third Parties to the appeal thus far.

⁹ The EA’s erroneous allegation that these activities were also unlawful is entirely rejected and the Appellant’s response is set out in paragraphs 7 to 10 above.

38. At this stage, the Appellant has no additional comments to make in relation to any of the representations which have been submitted by Third Parties. All of the relevant matters raised therein are referenced in the Appellant's Grounds and SoC.
39. All of the concerns raised by Third Parties will therefore be addressed in the Appellant's evidence to the appeal in due course.

Freeths LLP
18 October 2023

APPENDIX 1

From: Emma Conwell
Sent: Monday, October 16, 2023 10:44 AM
To: Bunten, James <JAMES.BUNTEN@planninginspectorate.gov.uk>
Cc: Sarah Mills <Sarah.Mills@freeths.co.uk>; Alison Ogley <Alison.Ogley@freeths.co.uk>
Subject: RE: APP/EPR/636 - Appeal by FCC Recycling (UK) Ltd - Final Comments deadline request extension - 18.10.23

Dear Mr Bunten,

Thank you for sending through the EA's letter, dated 3 October, ("the October Letter") which states that the appeal should be withdrawn.

The Appellant does not agree and does not intend to withdraw its appeal.

The October Letter discloses no authority or proper justification for the EA's request that the appeal be withdrawn.

Thus far, the EA's position in this appeal has been characterised by delay and continued unreasonable conduct in failing to: i) properly particularise its case; ii) engage with the Appellant directly as part of the appeal process; and iii) adhere to time limits and continually request extensions of time. This most recent attempt by the EA to derail the appeal process altogether is another example of unreasonable behaviour.

On 9 June, the EA indicated (via PINs – see email dated 9 June from you to me) that it wished to discuss the Appellant's agent directly with a view to working towards an agreed outcome. Since then, no contact has been made with us by the EA directly to discuss any potential for a negotiated agreement which could avoid the need for an appeal.

The proposed regulator-initiated variation of the permit was notified to the Appellant directly, outside of the appeal process. The EA has not communicated with Freeths as the Appellant's agent in connection with this issue.

On becoming aware of the EA's proposed variation (and yet another request from the EA for an extension of time to comply with specified appeal stages), Freeths (on behalf of the Appellant) wrote to you on 8 September 2023 and stated, in terms, that the proposed variation would not resolve the issues in the appeal. That position has not changed.

The Appellant considers that the regulator-initiated variation, which was formally issued by the EA on 29 September ("the Varied Permit") is unlawful and has failed to comply with the relevant procedural requirements of the Environmental Permitting (England and Wales) Regulations 2016.

The Appellant will be appealing, on a protective basis, the Varied Permit and will apply for this to be conjoined with the present appeal. The issues in both appeals are materially the same as the current appeal and in our opinion, the most efficient and fair approach for the appeals to be conjoined and for the appeal timetable to progress.

Furthermore, the EA has partially revoked the permit which it granted for the Appellant's Maw Green site ("the Maw Green Permit") on 27 July 2023. As the EA and PINs will be aware, the Maw Green Permit is directly relevant to the current appeal and a copy of this was provided as part of the Appellant's Rule 6 Statement. The Appellant considers that the regulator-initiated variation for the Maw Green Permit, which purportedly took effect on 5 October 2023 ("the Maw Green Variation"), is unlawful and failed to comply with the relevant procedural requirements of the Environmental Permitting (England and Wales) Regulations 2016. The Appellant will be appealing, on a protective basis, the Maw Green Variation and will apply for this to be conjoined with the present appeal and the appeal against the Varied Permit. The issues in all three appeals will be materially similar and accordingly, the most efficient and fair approach is for the appeals to be conjoined and heard

together. We consider that the Appellant's estimated Inquiry sitting days will not be affected by the conjoining of the appeals.

The Appellant will proceed to issue its written comments on the EA's Rule 6 Statement in accordance with the current deadline of 18 October 2023 and respectfully requests that once the two further appeals are made, that the Inspector convene a Pre-Inquiry Meeting as soon as possible in order to issue directions as required and ensure that further delays to the appeal process are avoided.

Kind regards
Emma

APPENDIX 2

From: Emma Conwell

Sent: Friday, September 8, 2023 6:19 AM

To: Bunten, James <JAMES.BUNTEN@planninginspectorate.gov.uk>

Cc: Alison Ogley <Alison.Ogley@freeths.co.uk>; Samuel Gilkes <Samuel.Gilkes@freeths.co.uk>

Subject: RE: APP/EPR/636 - Appeal by FCC Recycling (UK) Ltd - New Final Comments deadline - 11.10.23

Dear Mr Bunten,

I note the submission of a request for a further extension of time by the EA and the reasons given therein.

We are concerned that a further extension has been granted to the EA, which will now have gained an additional month to particularise its case and 'make good' the clear failings in its Statement of Case as submitted.

We note the reference to the amended EP and confirm the EA has contacted our client regarding this. However, we understand that the EA is (through their proposed permit variation) seeking to impose conditions in respect of asbestos which require all asbestos related activities to be 'enclosed'. The proposed varied permit in the form provided to FCC by the EA, does **not** resolve the case or narrow the points in dispute.

As such, the Appellant would have objected in the strongest possible terms to the extension if it had been consulted prior to the extension being granted to the EA.

It is unclear why the Appellant was not given an opportunity to comment on this application, prior to it being determined.

The proposed amended permit does not narrow the issues between the parties and the Appellant is now at serious disadvantage given i) the detailed grounds the Appellant has already provided, along with its full Statement of Case; ii) the EA's failure to properly particularise its case to date, including a refusal to provide details of its witnesses; iii) the amount of time the EA has already been granted to provide comments on the Appellant's full Statement of Case and thereby 'make good' its failures to date (it is noted that comments on Rule 6 Statements are somewhat unusual in cases allocated to the Public Inquiry track).

In the interests of preventing future prejudice to the Appellant's position, we would kindly request that further applications (whether for extensions or otherwise) by the EA are shared with the Appellant before a decision is made and as promptly as possible to allow the Appellant the opportunity to comment.

I note that the inquiry date is still listed for January although it is mentioned that this remains under review. As previously notified, one of the Appellant's experts is not available for the proposed Inquiry dates in January.

The Appellant's position is that on the basis of the latest extension, the proposed timetable for the SOCG, CMC, submission of Proofs of Evidence and the Inquiry itself has been rendered even more unrealistic. The Appellant seeks clarity and certainty on the proposed timescale and the Inquiry date as a matter of urgency as continued uncertainty is prejudicing its ability to properly prepare and coordinate its team of expert witnesses. The Appellant does not wish to see the appeal unduly delayed and requests that a revised timetable and Inquiry date be put in place as a matter of urgency. However, it continues to hold the view that February is the earliest date when the Inquiry should be held, in accordance with previous indications from PINs.

We reiterate that we consider service of indicative witness lists to be necessary for determining the length of the Inquiry and, indeed for the progression of any meaningful discussion of the proposed Statement of Common Ground.

We look forward to your earliest reply in order that we can ensure the Appellant's team has sufficient opportunity to prepare its case.

Kind regards,

Emma