

**APPEALS ON BEHALF OF
FCC RECYCLING (UK) LTD AND 3C WASTE LTD**

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

**REGARDING PROPOSED SOIL TREATMENT FACILITIES
AT
DANESHILL LANDFILL SITE & MAW GREEN LANDFILL SITE**

**APPEAL REFERENCES APP/EPR/636 (APPEAL 1); 651 (APPEAL 2);
AND 652 (APPEAL 3)**

APPELLANTS' CLOSING STATEMENT

Introduction

1. This is a conjoined appeal relating to the Appellants' applications to vary environmental permits at the Daneshill Landfill Site and the Maw Green Landfill Site, so as to operate a soil treatment facility to treat and recover soils which are contaminated with asbestos containing materials (bound asbestos only).

2. The three appeals which have been conjoined and which are the subject of this Public Inquiry are as follows:
 - 2.1 Appeal One: this is an appeal against the refusal of the Appellants' application to vary the Environmental Permit for the DH Site, which was submitted to the Environment Agency on the 22 January 2021, relating to Environmental Permit EPR/NP3538MF (V009);

 - 2.2 The Appellants' application to permit the Soil Treatment Facility to recover bound asbestos contaminated soils was refused in its entirety by the Environment Agency on 9 December 2022 (N.B. the Environment Agency did however grant V9 of the DH EP so as to permit the operation of a soil treatment facility for wastes containing hydrocarbon via bio-remediation);

 - 2.3 Appeal Two: This relates to an appeal against the Regulator Initiated Variation of the EP for the DH Site, (EPR/NP3538MF/V010) which was issued by the Environment Agency on the 29 September 2023;

2.4. Appeal Three: this relates to an appeal against the Regulator Initiated Variation at MG Site (EPR/BS7722ID/V010) issued on 5 October 2023.

3. Appeal One therefore relates to the entire refusal of the Environment Agency to issue any permit for the treatment of asbestos contaminated soils (bound asbestos only) at the DH Site, whereas Appeals Two and Three relate to the imposition of conditions on the Regulator Initiated Permits for each site, which have been granted to permit the treatment of soils contaminated asbestos containing materials (“ACMs”).
4. As already set out in the Appellants’ submissions to date, it is important to note that (unlike the case at Daneshill) prior to the Regulator Initiated Varied Permit for Maw Green, the Environment Agency granted a permit (on the terms which the Appellant sought in its application to treat ACMs (bound asbestos only)) at the Soil Treatment Facility at Maw Green, on 20 July 2023 (EPR/BS7722ID/V009). The Appellant drew the Environment Agency’s attention to the issue of the MG EP (V9) for Maw Green, in its Statement of Case for Appeal One (dated 27 July 2023). Without any prior notice being given to the Appellant, the Environment Agency revoked MG EP (V9), through its Regulator Initiated Variation, and the latter is the subject of Appeal Three.
5. Appeal One was submitted on 1 June 2023. The appeals against the two Regulator Initiated Variations were submitted on 17 November 2023 (Appeals Two and Three).
6. There has been an unusually long period from the submission of Appeal One to the commencement of the Public Inquiry. In large part, this is a result of delays in the submission of the Environment Agency’s Statements of Case (which were repeatedly objected to by the Appellants) and the need to appeal the two new Regulator Initiated Variations for DH and MG.
7. The Public Inquiry was heard over a total of 8 days, sitting on 19 to 22 March 2024 (Week One) and 30 April to 3 May 2024 (Week Two) in Retford.
8. During Week One of the Public Inquiry, members of the public attended the Inquiry (in respect of Appeal One and Two in particular) and concerns were raised over the availability of Inquiry documents in the public domain. Unfortunately, despite undertaking to do so, the EA had not provided copies of the Inquiry documents so that they could be accessed by members of the public. To ameliorate this problem, a number of steps were taken as a matter of urgency which included:

- 8.1. Making hard copies of all of the main party's evidence available to a member of the public at her request (Ms French; this was provided to Ms French by the Appellant's team during the course of Week One);
 - 8.2. The setting up of a website for access to all of the Inquiry documents by the Appellant (albeit this was superseded by the EA's public access website in due course);
 - 8.3. The EA setting up a website for full access to all Inquiry documents;
 - 8.4. Notification, by email, undertaken by PINs and/or the EA to all members of the public who had made representations to the appeal to provide direct links to the website.
9. Full access to all Inquiry documents (as at that date) was therefore available to the public from 25 March 2024, 5 weeks in advance of the commencement of Week Two of the Inquiry and prior to the Appellant providing its evidence to the Inquiry.¹

Preliminary Issues

10. In the intervening period between the two sitting sessions of the Public Inquiry, a procedural objection was lodged on behalf of Ms Vivienne French, in respect of Appeal One and Two, citing alleged breaches of the EPR Regs². In summary, Ms French alleges that the EA failed to undertake a public consultation with respect to the Regulator initiated variation (V10) of the Daneshill Permit which it made to grant environmental permits to the Appellant for the Daneshill Site, which was designated as an application of High Public interest ("HPI") by the EA prior to its previous refusal to grant any permission for treated of asbestos contaminated soils when it issued V009 of the Permit. The regulator-initiated permit is the subject of these proceedings (Appeal B/Two). The Appellant agrees with Ms French that the EA did fail to undertake consultation in respect of its decisions to issue either of the regulator-initiated permits.³
11. However, the absence of consultation regarding the regulator initiated variations has been fully addressed via the Public Inquiry process which has provided members of the public and the Appellant with a full opportunity to respond with comments.
12. The Appellant also agrees with the EA that, in so far as third parties are concerned, no prejudice would have been caused in any event as the variations were fully in line with consultation responses received by members of the public when the former application (Appeal One) was refused by the EA. Nonetheless the appeal process is a complete answer to any

¹ Third parties could not, of course, put questions to the EA's witnesses under the normal rules of procedure which prevent 'friendly fire'.

² See email from Vivienne Frech, dated 2 April 2024.

³ See Para 9 CD5/1/A

earlier mis-step in procedure and consultation in respect of the regulator initiated variations for both Maw Green and Daneshill.

13. Additionally, third parties who have attended the Inquiry⁴ and made written representations (all in connection with Appeal One and Two) have raised concerns regarding notification and consultation in respect of the appeals actually taking place. It is important to place these concerns in the context of: i) the requirements of the EPR Regs regarding notification of Public Inquiries for environmental permitting appeals; and ii) what notice has actually been provided to the public regarding the Public Inquiry being held.
14. Appendix 1 to these Closing Submissions set out the steps taken by both the EA and the Appellants to notify any third parties, who may be interested in the Appeals, of the fact that the Appeals were proceeding, that they were to be heard by way of Public Inquiry and the location/dates on which the Public Inquiry was to take place. It is important to note that the EPR sets out the legal requirements for notice to be provided to “affected and interested parties” in the event an appeal is brought against a decision of the EA⁵. The EP Regs require only that the EA must, “give notice of [the appeal] to any person whom the regulator considers is affected by, is likely to be affected by, or has an interest in, the subject matter of the appeal”.⁶ Accordingly, it is a matter for the EA’s judgment to determine whether notice should be given and if so, who that notice should be given to. If notice is to be given, it must include: i) a description of the subject matter of the appeal; and ii) a statement that representations may be made to the Planning Inspectorate⁷ within 15 days after the date of the notice.
15. There is no legal requirement for any further information to be provided to third parties, regarding the progress of any appeal, in accordance with the provisions of the EP Regs.
16. Nevertheless, both the EA and the Appellants have taken additional steps to advertise the fact that a Public Inquiry was to be held to determine all three of the appeals (see Appendix []). Indeed, members of the public did: i) make written representations in response to Appeal One in/around July 2023; ii) attended the Public Inquiry in person during both Weeks One and Two of the same; iii) made oral representations to the Public Inquiry (predominantly in Week Two of the Public Inquiry); iv) were invited to attend the Public Inquiry virtually by way of live streaming and, if requested, address the Public Inquiry virtually (Week Two).

⁴ Including Mrs French

⁵ See EP Regs; Schedule 6; paragraph 4.

⁶ The notice should be provided within 10 days of the EA receiving notice of an appeal; it appears in this case that the letter issued to affected parties by the EA was not issued within 10 days, but is difficult to see what prejudice could have been caused to third parties given that notice was issued, by letter dated 12 July 2023, well in advance of the Public inquiry.

⁷ In this case, subject to any decision of the Secretary of State regarding ‘call in’.

17. Furthermore, when Appeal One was submitted by the Appellants, publication of the appeal was provided by Lound Parish Council to members of the public via its website, with notice being given by the Parish Council on 14 July 2023; information regarding how to submit representations (via the case officer at the Planning Inspectorate) in respect of the appeal was included on the Parish Council's website.
18. A late representation to the Inquiry was received from Friends of the Earth dated 23 April 2024 (iiq8/9/a). The appellant is concerned at the language used in the submission regarding an alleged underhand attempt by the appellants to reverse key protections for the community, that assertion has no basis in fact. The appellant has exercised its right to appeal the Environment Agency's decision that is the beginning and the end of the matter. The appendices to the submission deal with and relate to the planning process for the DH Site which took place in November 2020 (appendix A, IQ/8/9/C). It is obvious from reviewing the Secretary of State's screening decision during the planning application process that a risk assessment of the proposed activity was required to be undertaken via the environmental permitting process (see third paragraph, page 5). That risk assessment has now of course been undertaken by Dr Cole. The submission made by Friends of the Earth to the Inquiry can be safely put aside.
19. Finally, on procedural objections raised by third parties in respect of Appeal One, the suggestion that Appeal One was not made in accordance with the relevant time limits is simply incorrect. A draft permit in respect of Appeal One was published on 22 October 2022, for public consultation. However, the Environmental Permit (DH V9 at CD3/4) was not issued until 2 December 2022. The Appellants submitted Appeal One to the Inspectorate on 1 June 2023 – within the relevant 6 month time period (which expired on 2 June 2023) and this was formally confirmed as validly made by the Planning Inspectorate on 5 June 2023.

Legislative Powers – Decision Making on Appeal

20. The decision maker (whether an Inspector appointed on behalf of the Secretary of State, or the Secretary of State directly) has the following powers available to them on determination of the appeals in accordance with the EP Regs:
 - 20.1. Regulation 31(5) of the EP Regs: "When determining an appeal in respect of a decision, the appropriate authority has the same powers as the regulator had when making the decision"; those powers therefore include:
 - 20.1.1. Regulation 13 of the EP Regs to grant a permit to an operator for the operation of a regulated facility;

- 20.1.2. Regulation 20 of the EP Regs to vary an environmental permit, “on its own initiative”;
- 20.1.3. Regulation 22 of the EP Regs to revoke an environmental permit, “in whole or in part” and may vary the permit conditions, “to the extent that it considers necessary to take account of the revocation”⁸.

20.2. As defined in Schedule 6 of the EP Regs, the “appropriate authority” is the relevant Secretary of State. However, in accordance with Section 114 (1) and (2) (viii)⁹ of the Environment Act, the Secretary of State may delegate the appellate function to “any person to exercise on his behalf”; this delegation has of course taken place in the current case¹⁰ and accordingly, the Inspector has the same powers as would have been available to the Secretary of State.

21. Accordingly, should the Inspector consider that the appeals should be upheld, the Inspector has a wide range of powers to grant wholly new environmental permit/s to the Appellant (subject to appropriate conditions), revoke the permits already granted to the Appellant by the EA and/or vary the permits already granted to the Appellant by the EA.

Key Factual Background

The DH Site

- 21.1. The DH Site is an existing non-hazardous waste landfill which is undergoing restoration.
- 21.2. The proposed Soil Treatment Facility (“STF”) site is located within the footprint of Daneshill Landfill Site which is located approximately 2km east of Lound Village, 6km north-west of Retford and 11km north east from Worksop. The site is bordered to the north and east by agricultural land and mixed woodland and to the west. South-west are nature reserved and the Daneshill Lakes. The landfill operates pursuant to a ROMP¹¹, which will expire in 2048. The Appellant’s restoration scheme for the landfill anticipates that restoration of the landfill void will be complete within 10 years (subject to sufficient waste arisings, including hazardous waste to be pre-treated at the Site prior to use in the restoration of the landfill).
- 21.3. The DH Site location is shown in the Proof of Evidence of Simon Cole at Figures 8.1 and 8.2.

⁸ It should be noted that specific consultation requirements apply, in accordance with Schedule 5 of the EPR Regs, in respect of regulator initiated variations or revocations.

⁹ See also the Government’s Guidance: “Environmental permit – Guidance on the Appeal procedure”, updated 6 November 2023.

¹⁰ A request for the Secretary of State for the appeals to be ‘called in’ has been made by the Friends of the Earth, on 2 May 2024.

¹¹ Review of Old Minerals Permission

21.4. Details of the closest human receptors to the DH Site STF operational area are set out in the table below:

		distance (m)
1	Travellers Site 1	169
2	Travellers Site 2	167
3	Daneshill Cottages	430
4	Loundfield Farm 1	471
5	Loundfield Farm 2	567
6	Tudorstone Building Materials	288
7	Tomlinson Family Settlement	394
8	Industrial Estate to North West	875

21.5. Details of the closest footpaths to the DH Site STF operational are set out in the table below:

		Distance (m)
1	Public footpaths in Daneshill Lake Nature Reserve	539
2	Public footpath on site access road	0

The MG Site

21.6. The MG Site is an existing non-hazardous waste landfill which is undergoing restoration. The MG Site and soil treatment facility is operated by Provectus on behalf of 3C Waste Limited, a wholly owned subsidiary of FCC. The landfill site is partially completed and areas are currently awaiting restoration. MG Site is located off Maw Green Road, Coppenhall, Crewe, Cheshire, CW1 5NG. The southern boundary of the MG Site is located approximately 2km north of the centre of Crewe (i.e. on the outskirts of Crewe). The MG Site is on the north-eastern outskirts of the town of Crewe. As is the case with the DH Site, residential properties are located within 500 metres of the proposed STF boundary at the MG Site.

21.7. The MG Site location is shown in the Proof of Evidence of Simon Cole at Figures 8.3 and 8.4.

21.8. Details of the closest human receptors to the MG Site are set out in the table below:

		OS GR Xm	OS GR Ym	distance (m)
D1	Brook House Farm	372139.1	357327.8	241
D2	Brook House Barns	372174.0	357310.6	280
D3	Meadow Croft Cottage	371910.4	357125.4	191
D4	New Development (Maw green Road)	371852.8	357074.0	214
D5	New Development (Maw green Road)	371883.7	357102.6	197
D6	New Development (Maw green Road)	371936.4	357156.0	184
D7	New Development (Maw green Road)	371956.0	357183.9	175

D8	South of Maw Green Road	371642.8	357074.7	238
D9	South of Maw Green Road	371583.3	357074.0	273
D10	Windy Nook	371459.1	357112.4	347
D11	Shandon Barn	371359.0	357373.6	413
D12	Cattle Arch Farm	371722.6	357066.2	218

Chronology

- 21.9. The Chronology for the application and post application process at the DH Site is as set out at Appendix B of Leslie Heasman's Proof of Evidence.
- 21.10. The Chronology for the application and post application process at the MG Site is as set out at Appendix C of Leslie Heasman's Proof of Evidence.

Maw Green

22. The Soil Treatment Facility at Maw Green (which is the subject of Appeal C/Three) has previously been in operation August 2022 – October 2023. The purpose of the STF is to provide suitable, recovered soils for restoration of the landfill at Maw Green; it is expected that this will take 6 years to complete, assuming the STF is operating and can accept soils contaminated with bound asbestos for treatment.
23. Planning permission for the STF was granted by Cheshire East Council (ref 19/1376N) for the, "Development and operation of a temporary soil treatment facility at the maw green landfill site" on 30 October 2019 ("the Maw Green Permission"). Condition 4 of Maw Green Permission requires the STF to be removed and the site restored, "following permanent cessation of all soil treatment operations, or by 31st December 2028, whichever is sooner".
24. The STF operated at the Maw Green site first under the deployment of a mobile permit and thereafter under the installation permit granted by the EA (ref EPR/BS7722ID/V009 dated 20/07/23) which was then revoked/varied by the EA under regulator-initiated variation; that latter permit (V10) forms the subject matter for Appeal Three.
25. It should be noted that the regulator initiated variation which resulted in V10 of the Maw Green Permit continued, as is the case for V9 and V10 of the Daneshill Permit, to grant consent for the operation of the STF to treat hydrocarbons by way of bioremediation, which is to take place outside. In summary, the key difference between V9 and V10 of the Maw Green Permit is that the EA variations require any treatment of soils containing ACMs to take place:
- 25.1. In a building;
- 25.2. With 'full enclosure' of the proposed screener; and

- 25.3. With all dust emissions from the proposed screener to be directed to a HEPA filter (or similar) and point source emission from the building.
26. It should be noted that since the EA's decision in October 2023 to revoke V9 of the Maw Green Permit (unilaterally) the operator (Provectus) and the Appellant have been forced to effectively mothball the STF (with soil inputs currently 25% of the same period last year). In light of the failure of the EA to notify the Appellant prior to, effectively, revoking this permit without notice, the Appellant and the operator have suffered clear prejudice and unfairness as a result of the EA's decision.
27. During the operation of the Maw Green STF, the operator (Provectus) undertook ongoing monitoring of emissions; these were available to the EA to inspect as its officers required. Through XX¹², the EA agreed that the proposed operation of the STF at Maw Green was identical to that which had been previously undertaken at that site.

Daneshill

28. No operating Soil Treatment Facility has, to date, been in situ at the Daneshill landfill site. An application was previously submitted to the LPA for planning permission, but this was refused on 12 December 2022 with the reason given as, 'insufficient information', as opposed to any substantive reason for refusal.
29. As is the case for Maw Green, the purpose of the STF is to provide suitable, recovered soils for restoration of the landfill at Daneshill. It is expected that landfill restoration at Daneshill will take 10 years, assuming the STF is in operation and can accept soils contaminated with bound asbestos for treatment.
30. Once the landfill has been restored, the STF will be redundant.
31. It is expected that, should the permit be granted in accordance with the Appellant's appeal (Appeal One and Appeal Two), any planning permission subsequently granted for the STF will be appropriately conditioned along similar lines to Condition 4 of the Maw Green Permission, with further conditions (as per the Maw Green Permission) requiring the site to be restored to its pre-development state, as is common with temporary permissions and, of course, landfills¹³.

¹² Paul Barker XX.

¹³ Accordingly, the EA concern raised at para 4 of the EA's comments on the Appellant conjoined R6 statement (CD5/6) is entirely dealt with through the planning process

32. Although there appeared to be some initial reticence on the part of the EA, Mr Barker accepted (XX) that the proposed STF activities ‘as applied for’ at Daneshill would be identical to those carried out previously at Maw Green. This is of course evident from the details set out in the respective applications for both sites and is clearly and carefully explained in the evidence of Ms Heasman (see CD6/2/A).

The EA’s Position in the Appeal – General Comments

33. It was evident during oral evidence at the Inquiry (including: i) the nature of the evidence submitted by the EA; ii) the responses to xx of all of the EA’s witnesses; and iii) the adventurous xx of Dr Cole¹⁴) that the EA has fundamentally misunderstood key aspects of the Appeal Proposals for both sites. This echoes the obvious failures, during the determination process in respect of Appeal One [see FOI responses at CD9/2/C], to understand and engage with the key technical issues which are pivotal to the proper determination of all three appeals. Had the EA undertaken its duties properly, when determining the application for Appeal One, it is highly likely that this appeal could have been avoided entirely.

34. During the determination of the DH Application (Appeal One) the EA:

- 34.1. Fundamentally failed to understand the nature of the proposals in respect of several key aspects, in particular (but not limited to) the critical importance of the proposed acceptance criteria for ACM contaminated soils to be treated at the STF;
- 34.2. Failed to adopt and apply a ‘risk based’ approach to determining the DH Application (see email from CH at CD/9.2.C.D.4);
- 34.3. Intentionally ignored monitoring data which was available and highly relevant, to the key issue of the likely actual emissions which would arise from the proposals;
- 34.4. Applied internal, unpublished guidance which had not been subject to stakeholder or public consultation and which had not been disclosed to the Appellant which states ‘in terms’ that “Screening cannot proceed unless the process is enclosed and

¹⁴ This related to two points regarding: i) the inclusion of waste codes in V9 DH Permit, V10 DH Permit, and V10 MG Permit; and ii) whether ‘mixing’ of hazardous waste would take place as part of the Appeal Proposals. In effect, this stemmed from a fundamental misunderstanding of Dr Cole’s evidence (at paragraph 4.1.8 of Dr Cole’s Rebuttal; CD6/1/E). Both of these points were authoritatively and fully dispensed with by the EIC of Ms Heasman who confirmed that i) none of the Permits issued to date (for either Site) would permit the acceptance of ‘C&D waste’ other than soils containing visible fragments of bound ACMs; and ii) there would be no ‘mixing’ of any hazardous waste at the Site if the Appeal Proposals were granted – the EA had mis-directed itself on this point; bulking of soils containing ACMs would take place (entirely in accordance with the Appropriate Measures Guidance (CD1/T) as part of the storage activity. It is surprising that the EA were unable to understand these issues, given that the processes are identical to those already carried out and authorised to be so carried out by the EA at ERQ.

asbestos fibres are abated via a HEPA filter” (“the WIP Document”)¹⁵; as accepted by GR (XX) this is a clear breach of the Regulators Code¹⁶;

- 34.5. Failed to undertake any objective, evidence based risk assessment, to support its decision making process and/or eventual decision.
35. At the close of the evidence to the Inquiry, the EA’s case continued to be characterised by all of the failings which infected its decision making during the determination of the DH Application.
36. When looked at in its totality, the EA’s evidence to the Inquiry can be fairly described as nothing more than a series of generalised assertions, supported by no quantitative data or evidence in support. It has sought to rely upon what it claims to be its ‘strategic direction’ of moving towards enclosing all waste facilities (within buildings or otherwise) as a ‘default position’ (PB EIC) to support its assertion that the Appeal Proposals should be ‘enclosed’, irrespective of the risk posed by emissions from the same. As with the EA’s stance during the determination of the DH Application, the EA’s position in this regard is not supported by any adopted guidance which has been published, following appropriate consultation with respect stakeholders and the public. There can be no doubt that taking such an approach is, again, a clear breach of the Regulators’ Code and, even more seriously, in directly in conflict with the requirements of the IED, BATC, BREF and the EP Regs.
37. As all of the EA’s witnesses directly conceded (XX of GR, CL, DK and PB) the EA is required to adopt a ‘risk based’ approach to environmental permitting decisions; by the admission of its own witnesses at the Inquiry, it has utterly failed in this case to do so.
38. In addition, the EA’s position has been characterised by ongoing confusion, conflicting opinions of its own witnesses, obfuscation and last minute ‘volte face’ changes in its case at the Inquiry; in summary¹⁷, these include:
- 38.1. Accepting¹⁸ that soils with ACMs can be stored outside, with tarpaulin covers and that this fulfils the requirements of BAT and, in particular BAT14d;
- 38.2. That based on the monitoring data submitted by Provectus (during the operation of the STF) at Maw Green, nuisance dust is not a cause for concern. This data renders

¹⁵ See Appendix 11 to GR Evidence; CD7/4/L; it should be noted that the WIP Document was only disclosed to the Appellant during the appeal process, once the Appellant had noted reference to it in an EA Decision Document and expressly requested it to be disclosed to it.

¹⁶ CD1/IQ1/AH

¹⁷ The detail of all of these developments in the EA’s case will not be set out in these Closings in full, but will be addressed in further detail in the Appellant’s application for costs.

¹⁸ Week One of the Inquiry.

a further trial pointless given the extent of the information before the Inquiry (accepted in XX by DK)¹⁹;

- 38.3. That a blanket requirement (as stipulated in the EA's internal WIP document) to enclose operations is not consistent with the EA Appropriate Measures Guidance and BAT (XX of PB);
 - 38.4. That the duty to control pollution and ensure 'appropriate measures' are used²⁰ applies to all EPs including MTLs and that the MTLs used at MG/ERQ carried out the same process as applied for in the appeals (assuming that the activities are limited to the operation of one screen and one picking station at a time) (XX of PB);
 - 38.5. That concerns that the EA raised regarding fibres in soils being entrained in the treatment pad surface is no longer an issue (XX of PB, also see IQ9/8/C); and
 - 38.6. Accepting that the picking cabin as proposed for each site was acceptable and did not need to be located in a building.
39. During the determination of the DH Application, it could not be clearer that the EA's officers adopted the position that they would not advise the Appellant to "build a building", due to the fact that the DH Site is an "old munitions site and there has been comment that a building may not be appropriate"²¹. However, until the final day of evidence at the Inquiry, the case for the EA was clearly predicated on the basis that the 'mechanical screener' proposed for use by the Appellant as part of the Appeal Proposals must be "fully enclosed" and located within a building²².
40. The EA's position became even more confused during the examination of the evidence at the Inquiry, when (following XX of GR²³), CL asserted (EIC) that the EA did not mean a building with foundations must be provided and that the EA's requirements for the screener to be sited within a building could be met by the Appellant utilising what was referred to as a 'ZAPP Shelter'. CL provided no objective evidence or assessment to explain the nature of a 'ZAPP Shelter' to the Inquiry or to assess whether it would indeed be possible for the Appellant to locate its operation within a structure of this nature. The potential suitability for such a structure to be used for the Appeal Proposals was robustly dispensed with (LH EIC²⁴) and the clear

¹⁹ In addition, it should be noted that the Appellant proposed a trial of the mechanical screener at ERQ; this was rejected in its entirety by the EA (See CD9/1/G and I)

²⁰ Ms Heasman explained (EIC) that appropriate measures are in effect part of BAT

²¹ CD9.2.C.A.2; email from Ms Katie Dunmore to Mel Bischer

²² Indeed, this is the position the EA adopted throughout the Appellant's efforts to discharge the pre-op condition regarding the use of a mechanical screener at ERQ; see Ms Heasman's Appendices (CD6/2/B) at Table D1; copies of all relevant correspondence referred to in Table D1 are provided in CD9/1/A-J.

²³ Which drew the EA's attention (again) to its own internal correspondence which recognised the potential difficulties with constructing a building at the DH Site in particular.

²⁴ Who explained that such a structure would be wholly unsuitable for the Appeal Proposals, due to the limited 'head height', susceptibility to damage with heavy equipment and susceptibility to weather conditions (wind in particular) and which would be incapable of complying with the EA's additional 'requirement' to 'collect' all emissions from the mechanical screener and direct those to a HEPA filter and point source emission point.

evidence from the Operator (LH Appendix E²⁵) which: i) was not challenged; and ii) sets out its careful assessment of the type of building which would be required to be constructed, if it were indeed necessary to provide such a building to secure compliance with BAT.

41. On the morning the Appellant was due to complete its evidence to the Inquiry (2 May 2024), the Environment Agency fundamentally altered its position again regarding what it considered to be adequate ‘enclosure’²⁶ of the proposals, stating that it now considered (despite its position at ERQ since 2021 and its position throughout the remainder of the Appeals²⁷) it ‘acceptable’ for the mechanical screener to be either: i) sited with a ‘suitable building’; or ii) be ‘fully enclosed’. This is yet another example of the EA’s failure to conduct its case properly, engage with the Appellant (either during the application process for discharging the pre-operative condition at ERQ or during the appeal process). At the third day of the second week of the Inquiry, the EA has still not advanced any objective evidence²⁸ as to what it considers to be a “suitable building” save for Mr Lowe (EIC) stating that a ‘ZAPP Shelter’ would be appropriate for compliance with the EA’s interpretation of BAT14d.

The Correct Approach to Environmental Permitting Decisions

42. Risk Assessment is at the very core of decisions regarding environmental permitting.
43. This was rightly conceded at the Inquiry by all of the EA’s witnesses (XX GR, DK, CL and PB) and is, as Ms Heasman eloquently opined (EIC, XX and RX), a fundamental principle which underpins environmental permitting in England and Wales and, indeed, the EU (on which much of the law relating to environmental permitting in England and Wales remains based, even post-Brexit).
44. The EA’s insistence on a ‘zero tolerance’ approach, as its’ witnesses advocated for in this case, is entirely inconsistent with the wider regulatory framework approach. This was conceded (XX) by all of the EA’s witnesses. The ‘zero tolerance’ stance also ignores the reality of the world, which is not (by any measure) ‘asbestos free’; as is directly recognised by UKHSA (see CD1/IQ1/AD): “Asbestos is widespread in the environment”.
45. The Appellant accepts the general principle that there is ‘no safe level’ of asbestos in the environment. However, this is unremarkable in the context of the reality that there are a wide

²⁵ CD6/2/B

²⁶ Email from Mr Smyth to Ms Oogley dated 2 May 2024

²⁷ See also conditions in the Regulator Variation Permits at CD3/2 and CD3/3

²⁸ In the conditions session, DK indicated that a ‘suitable’ building would be that proposed in the ‘Byrne Looby’ document submitted to the EA for discharge of the pre-operational condition imposed on the ERQ Permit; this [CD9/1/C]; this directly conflicts with the oral evidence of CL (EIC).

range of substances and chemicals which are known to be 'non-threshold' carcinogens i.e. there is no 'safe level' for human health, which are nevertheless permitted to be released by the EA (and other regulators).

46. As Dr Cole and Ms Heasman drew to the attention of the Inquiry (EIC/RX), the EA has granted environmental permits for the operation of STFs at both appeal sites to treat soils contaminated with hydrocarbons by way of bio-remediation. The hydrocarbons in question include benzene, another 'non-threshold' substance, for which there is no known safe level for human health. That aspect of the STF (which is undertaken separately to the treatment of soils containing bonded asbestos) is permitted to be operated outdoors.

47. The requirement to assess risk is directly recognised throughout the EA's published guidance on this topic, not least:

47.1. "Risk assessments for your environmental permit" (CD1/AA²⁹) which states with respect to bespoke permits³⁰: "You must do a risk assessment if you want to apply for or change (vary) a bespoke permit, unless the Environment Agency can do your risk assessment";

47.2. The EA's "Consultation Outcome – Non hazardous and inert waste: appropriate measures for permitted facilities" (at pages 19-20 of the pdf document CD1/IQ1/AJ³¹);

47.3. "Appropriate Measures" for Non-hazardous and inert waste facilities (CD7/3/E);

47.4. "Chemical Waste: Appropriate Measures for permitted facilities" (CD1/T); see, for example, section 3.1 relating to "Waste pre-acceptance" which states: "Your procedures must follow a risk-based approach...".

48. Indeed, when considering the requirement to comply with 'best available techniques'³² ("BAT"), this cannot, as LH firmly elucidated (RX) be 'divorced' from a consideration of the risk posed by a particular activity. This is expressly recognised by 'BATC'³³, which implements the IED by establishing BAT for waste treatment, which states (for example):

48.1. "Pre-acceptance procedures are risk-based considering, for example, the hazardous properties of the waste, the risks posed by the waste in terms of process safety, occupational safety and environmental impact..."³⁴;

²⁹ Updated 21 November 2023

³⁰ All of the permits relevant to the Appeals are 'bespoke' permits.

³¹ Published 14 September 2020 and updated 1 August 2022.

³² As required by the Industrial Emissions Directive (CD1/A).

³³ CD1/Z.

³⁴ BAT2(a)

- 48.2. "...Acceptance procedures are risk-based considering, for example, the hazardous properties of the waste, the risks posed by the waste"³⁵;
- 48.3. "Handling and transfer procedures are risk-based..."³⁶;
- 48.4. "Depending on the risks posed by the waste..."³⁷.

49. As LH rightly emphasised (XX) consideration of risk is an integral part of BAT.

50. It is inconceivable, having regard to the wider regulatory framework which is applicable to environmental permitting, that the decision maker will not have to engage with and understand the risks posed by the Appeal Proposals in order to determine the central issue in dispute between the main parties i.e. whether 'BAT14(d)' requires the mechanical screener element of the Appeal Proposals to be 'enclosed' (either in a building or otherwise 'fully enclosed') in order that diffuse emissions are 'contained', 'collected' and/or 'treated'.

51. Indeed, BAT14 expressly states that, "Depending on the risk posed by the waste in terms of diffuse emissions to air, BAT14d is especially relevant"³⁸. Quite simply, in order to properly determine the appeals, the decision maker must engage with and consider the evidence which is available regarding the 'risks' posed by the waste that the Appeal Proposals will treat.

52. It is an essential pre-requisite of understanding and considering risk that the decision maker properly understands the nature of the waste itself and how the operator proposes to treat the waste. In this case, the decision maker must keep the following facts at the forefront of their mind:

52.1. The soil proposed for treatment is only classified as hazardous waste due to the presence of fragments of "bound asbestos" which are visually detectable within the waste;

52.2. If the soil did not contain those visible fragments of bound ACMs it would be classified as non-hazardous soil notwithstanding the presence of very low amounts of asbestos fibres ("free fibres") within the soil;

52.3. The testing protocols for the operation of the Appeal Proposals, which are embedded within the environmental permits via the incorporation of 'operational techniques' will ensure that the soil being received and treated at the Sites:

³⁵ BAT2(b)

³⁶ BAT5

³⁷ BAT19(c)

³⁸ See BAT14 of BATC (CD1/Z)

- 52.3.1. Will comply with the non-hazardous threshold for asbestos free fibres in soil with respect to chrysotile fibres;
 - 52.3.2. Will be lower (by a whole order of magnitude) than the non-hazardous threshold for asbestos free fibres with respect to amphibole fibres.
- 52.4. Those testing protocols are applied before treatment of the soil commences and after the treatment of the soil has been completed; there will be no doubt therefore that the recovered soil (i.e. the soil which has been treated to remove visible fragments of asbestos) remains classified as non-hazardous soil.
- 52.5. There is no 'treatment' available which is capable of removing free fibres of asbestos from soil. The treatment of the soil which the Appeal Proposals undertake is comprised of the physical removal (by way of screening and picking by operatives) of the visible fragments of bound asbestos. Accordingly, if the soil being treated by the Appeal Proposals contains free fibres of asbestos before the treatment process begins, it is inevitable that it will contain free fibres of asbestos once the treatment process has been completed by the Operator.

Main Issue in Dispute

53. At the close of the Inquiry, due to a number of concessions made by the EA (during the course of the Inquiry itself) which narrowed the issues in dispute between the main parties, the main issue for determination in the Appeals is:

Whether the risk posed by the treatment of soils containing bound ACMs, using a three-way mechanical screener as proposed by the Appeal Proposals³⁹, means that BAT14d ("containment, collection and treatment of diffuse emission") must be applied to that aspect of the Appeal Proposals.

54. It should be noted that the EA accepts the following aspects of the Appeal Proposals are compliant with BAT (including BAT14d) and the EA's relevant Appropriate Measures Guidance [CD1/T]:

- 54.1. The outdoor storage of soils containing ACMs (managed and covered as appropriate to avoid diffuse emissions);

³⁹ The Keestrack K3 Scalper; see Appendix I of the Appendices to Dr Cole's POE (CD6/1/C)

- 54.2. The handling of soils containing ACMs outdoors (i.e. the movement of those soils by way of HGVs/other vehicular equipment and mobile plant) during the storage and treatment process;
 - 54.3. The loading of soils containing ACMs onto conveyors (on which spray rails will be located) in order to transport/move those soils into the picking station;
 - 54.4. The removal of ACMs from the soil, undertaken by handpicking operatives within the picking station; that picking station is to be sited within a 'picking cabin' (which is not hermetically sealed or fitted with a HEPA filter) but not 'enclosed' within a building;
 - 54.5. The transportation/movement of soils after hand picking has taken place, by way of conveyors from the picking station to the 'post-treatment' stockpile (all of which takes place outdoors).
55. The issues in agreement between the main parties reflect the activities and operating techniques which the EA have permitted at the Appellants' site at ERQ (CD9/1/A).

Appeal Proposals – Risk Assessment

56. The EA failed entirely to adduce any evidence which could be considered, by any measure, to amount to a risk assessment of the Appeal Proposals in totality, or the specific element of the Appeal Proposals in so far as this relates to the 'treatment' of soils containing ACMs by way of the proposed mechanical screener.
57. In striking contrast Dr Cole⁴⁰, for the Appellants, undertook a detailed, thorough and careful assessment of the risks which would "posed by the waste in terms of diffuse emissions to air" of: i) the entirety of the Appeal Proposals; and ii) the specific risk which would be posed by using the mechanical screener to treat the waste in terms of diffuse emissions to air.
58. Dr Cole's risk assessment took into account and assessed a substantial amount of 'real world' monitoring data; obtained at 'near source' locations to the operational area (including the mechanical screener, where relevant). That 'real world' data was obtained from monitoring of fugitive emissions to air arising from the following activities undertaken by the Operator (on behalf of the Appellants):
- 58.1. The operation of the STF which was treating soils containing ACMs, including the use of a screener, at Maw Green under the Mobile Treatment Licence (granted by the EA) which was in place between August 2022 and July 2023;

⁴⁰ Recognised to be a leading authority on the risks posed by the treatment of asbestos contaminated soils.

- 58.2. The operation of the STF which was treating soils containing ACMs, including the use of a screener at Maw Green under the environmental permit (V9) from July 203 granted by the EA before it was, in effect, revoked by the EA in October 2023;
- 58.3. The operation of the STF at ERQ which was (and indeed still is) treating soils containing ACMs, without the use of a screener;
- 58.4. The operation of the STF at ERQ, which was treating soils containing ACMs, including the use of a screener, in accordance with a Mobile Treatment Licence (granted by the EA) which was deployed at the ERQ site between June 2022 and September 2022.
59. The monitoring data obtained from operations at Maw Green directly reflects the operations which the Appellants have proposed to undertake in Appeals One, Two and Three. There is no reasonable basis on which this data could be considered to be irrelevant to the determination of the main issue in the Appeals⁴¹. It is 'on all fours' with the Appeal Proposals.
60. The operations undertaken at ERQ, from which some of the monitoring data was obtained, are not 'identical' to the Appeal Proposals. That is a reflection of the fact that: i) some of the activities at ERQ currently take place in an 'open sided' building⁴² (storage of soils containing ACMs takes place outside); and ii) save for the time period when the screener was being operated under the mobile permit deployment, no screener was in use. Dr Cole's evidence however demonstrates, clearly and cogently, that the data is highly relevant and should properly be taken into account when assessing risks that are likely to arise from the Appeal Proposals.
61. Notwithstanding the extensive and comprehensive data set which was already available to Dr Cole⁴³, in order to take all reasonable and practical steps to ensure the 'worst case' weather conditions for fugitive emissions to air were captured in his assessment, an additional period of air monitoring was undertaken in September 2023, during heatwave conditions.
62. In addition to extensive data relating to air monitoring of diffuse emissions, Dr Cole also considered and assessed 'real world' soil sampling data. The soil sampling data was again obtained from actual operations undertaken by the Operator at both Maw Green and ERQ (in accordance with the permits which were, at the time, in force for both of those sites).

⁴¹ The EA previously discounted monitoring data from its decision making process on the sole basis that the data was obtained from another site, irrespective of the similarity of the actual process being undertaken (see CD2/2/G/42). DK accepted in XX that data from sites operating similar techniques would be acceptable to consider risk.

⁴² The presence of the building at ERQ is coincidental (it was, present prior to the STF) and was not proposed by the Appellants to meet the requirements of BAT14d.

⁴³ And the EA, had the EA been inclined to either i) request it be submitted to it by the Operator under the mobile treatment licence at Maw Green; or ii) consider the data which was submitted to it in quarterly reporting in accordance with the ERQ Permit.

63. Dr Cole (EIC) fairly described the data set (from monitoring of diffuse emissions) as the most comprehensive data set available in the UK, relating to the treatment of soils containing bonded ACMs. He emphasised that it was equivalent to that used by RIVM⁴⁴, in its comprehensive and peer reviewed study in 2003⁴⁵, which was also utilised in the 'Schwarz and Tromp' paper (CD IQ/1/2/A).
64. The results of the monitoring data are compelling. The data overwhelmingly demonstrates that the emissions to air of asbestos fibres, generated by the Appeal Proposals, is negligible. In over 95% of samples, the presence of asbestos fibres simply could not be detected in the air. In the small portion of samples where 'free fibres' could be detected in the sampled air (monitored at location which were 'near source' to the activities causing the emission), the quantum of free fibres detected were so low as to be several orders of magnitude below the Limit of Quantification.
65. Dr Cole carefully and cogently explained to the Inquiry (EIC) the relevance of the 'Limit of Detection' (LOD) and the 'Limit of Quantification' (LOQ) and how these affect the way in which the monitoring results have to be understood⁴⁶. Put simply, the LOD is the minimum amount of asbestos free fibres which need to be found in a particular sample for an analyst to confirm there is 'some' level of free fibres present. However, if a sample is found to meet the LOD, but not the LOQ, a high degree of caution must be applied to the sample results as the 'error margin' of analysis increase; in other words, there is a high degree of risk of a 'false positive'. The LOQ however is the amount of asbestos free fibres which need to be detected in a sample before there is a reasonable degree of confidence as to the accuracy and replicability of the result.
66. It is disappointing, but perhaps not surprising, given the lack of comparable expertise of the EA's witnesses, they were unable to comprehend the importance of the results of the extensive monitoring results. In an unsuccessful attempt to critique Dr Cole's work, Mr Barker⁴⁷ erroneously alighted upon fact that the monitoring results for soil sampling demonstrated a very low percentage of samples tested contained asbestos free fibres, suggesting that this may mean the 'worst case' for levels of asbestos free fibres in soil had not been assessed.
67. Firstly, this ignores the huge extent of the data set to which this analysis related which (properly interpreted and understood) gives a very high degree of confidence as to the replicability of the results moving forward. Secondly, rather than being a concern, the results of the analysis provide positive and robust confirmation that the Operator's pre-acceptance and pre-

⁴⁴ The Dutch equivalent to UKHSA

⁴⁵ CD IQ/1/2/A

⁴⁶ LOQ and LOD apply to results of soil testing in addition to air sampling.

⁴⁷ See Mr Barker's Appendix PB02; CD7.1.C

processing criteria act as an effective control to ensure that free fibres of asbestos in the soil remain at negligible levels (and this remains the case once processing with a screener has taken place).

68. Indeed, Dr Cole concludes: "It seems to be an extremely remote possibility that sufficient soil could be sourced that was substantially more contaminated than that received at ERQ and Maw Green for the past 3+ years"⁴⁸. Dr Cole's conclusion in this regard is also supported by a substantial body of UK lab data for soil testing, published by SOBRA in 2020, which demonstrated that of approximately 175,000 soil samples from sites being developed or remediated at which the presence of asbestos was suspected submitted for testing, asbestos was only detected in 1-20% of samples, with samples above the LOQ reported in 10-30% of samples submitted for quantitative analysis.
69. Dr Cole drew attention⁴⁹, in addition to 'real data' obtained from the Operator's activities at Maw Green and ERQ, to the extensive body of peer reviewed data from other sources which demonstrates, with a high level of confidence, that soils containing bound ACMs (as opposed to friable asbestos, such as pipe lagging/asbestos sheeting etc) is somewhat unique in respect of its propensity to emit, when being processed by comparable techniques,⁵⁰ only very low levels of diffuse emissions. Dr Cole emphasised Figure 2 of Swartjes and Tromp's paper (CD1.2; also see IQ1/2/A)⁵¹, which demonstrates that soil containing concentrations of asbestos fibres up to 1000 mg/kg (conversion 0.1% w/w) simply do not emit, when processed (even under worst case laboratory conditions) diffuse emissions of asbestos fibres into air above 20,000 f/m³ (conversion equivalent to 0.01f/ml by PCOM).
70. Dr Cole's approach, in using the results of the comprehensive monitoring data set, to assess risk is exemplary. He explained (EIC) that his approach had been both transparent and highly conservative in its approach, building in 'worst case' approaches and assumptions at every level of the risk assessment process. Those factors include (but are not limited to):
- 70.1. Monitoring was undertaken when active management techniques (specifically dust suppression) were turned off, therefore representing 'worst case' conditions for fibre emissions to air;
 - 70.2. Ensuring the use of 'near source' monitoring of emissions to air; as Dr Cole explained (RX)⁵² the use of 'near source' monitoring is preferred for risk assessment purposes

⁴⁸ See paragraph 4.1.10 of Dr Cole's Rebuttal; CD6/1/E

⁴⁹ Dr Cole EIC; also see paragraphs 4.1.5 and 4.1.6 of Dr Cole's Rebuttal.

⁵⁰ Dr Cole (XX) explained that 'sifting' is the effective equivalent of 'screening', taking into account the original language of the paper (Dutch) and its translation into English.

⁵¹ Which the EA accepted (Mr Smyth during XX of Mr Barker) that this study was based on a significant and comprehensive set of data, relating to monitoring which had been gathered over many years.

⁵² See also paragraph 7.1.1 of Dr Cole's POE (CD6/1/B)

as it provides the most accurate data for actual emissions arising from the activities themselves⁵³;

- 70.3. With respect to fugitive emissions from stockpiles, making no allowance for the effect of covers to reduce windblown emissions;
 - 70.4. No allowance was made to take into account any 'estimated' reduction that would be attributable to the management techniques which will be in force for the Appeal Proposals;
 - 70.5. No allowance for the suppression effect of weather conditions (i.e. precipitation for 30% of the time);
 - 70.6. No allowance for reduction of asbestos fibres which would be present on either: i) the treatment pad; or ii) the equipment being used to undertake the treatment process as a result of effective cleaning techniques (which are proposed as part of the operational techniques for the Appeal Proposals);
 - 70.7. That operations, including screening of the soil containing bound ACMs, takes place continually for every hour of every day, over a period of 5 and a half years;
 - 70.8. Assuming that all asbestos fibres emitted to air are comprised of amphibole, as opposed to chrysotile asbestos;⁵⁴
 - 70.9. Assuming that the receptor is a new born child at the first date of exposure (for the purposes of the risk assessment model) to emissions from the Proposed Activity⁵⁵.
71. Even with this highly precautionary approach to assessment, Dr Cole informed the Inquiry that in his career to date, he had never calculated a risk as low as this before (EIC). The risk Dr Cole has quantified, by reference to internationally and nationally recognised standards, is well below any level of risk which could sensibly be considered to be significant (to the tune of several orders of magnitude lower compared to any 'accepted' threshold for exposure to non-threshold carcinogens).
72. Applying minimum daily dispersion factors⁵⁶ (for the closest receptors to each site) in respect of Daneshill, the estimated lifetime risk of mesothelioma and lung cancer as a result of

⁵³ Albeit there will inevitably be a degree of 'baseline levels' of airborne asbestos fibres in the environment captured by this monitoring.

⁵⁴ Mr Chambers, a member of the public and a practitioner in the HSE/industrial disease field relating to asbestos, agreed with Dr Cole regarding the substantially higher risks posed to human health by amphibole asbestos, compared to chrysotile. Dr Cole directly addressed (EIC) the concern raised by Mr Chambers regarding the potential for increased risks in the event fibres were crocidolite; Dr Cole explained that the data did not support an approach which assumed 100% of the fibres were crocidolite (indeed the data supports the conclusion that the majority of fibres are chrysotile) and, in the event that this adjustment was made, it would not result in a meaningful increase in the overall degree of risk.

⁵⁵ See paragraph 7.1.48 of Dr Cole's POE (CD6/1/B);

⁵⁶ See paragraph 7.1.50 of Dr Cole's POE (CD6/1/B);

exposure to airborne asbestos emissions from the Appeal Proposals is, “approximately 1 in 230 million”⁵⁷. In respect of Maw Green, the risk is, “approximately 1 in 210 million”.⁵⁸

73. If minimum annual dispersion factors (for the closest receptors to each site) are applied, the risk is lowered even further: for Daneshill this is approximately 1 in 320 million; at Maw Green this is approximately 1 in 480 million.⁵⁹
74. The dispersion factors utilised by Dr Cole, derived from Mr Stoaling’s AERMOD dispersion modelling, were explicitly accepted by Mr Kirk (XX). They have not been challenged by any of the EA’s witnesses and no alternative quantitative assessment to derive dispersion factors has been submitted to the Inquiry. Mr Stoaling’s expert evidence as to the appropriate dispersion factors, which have been utilised by Dr Cole in his risk assessment, stands at the close of the evidence as substantively unchallenged.
75. Much was heard at the Inquiry about the alleged failure of Mr Stoaling to provide the EA with his ‘modelling files’. This point goes nowhere. Mr Kirk accepted the dispersion factors which Mr Stoaling derived from the model; he did not require sight of the modelling files in order to competently and fairly make this concession during XX. As Mr Kirk accepted (XX), the evidence of Mr Stoaling contained all of the information required by the EA to build its own model and test any of the parameters which Mr Stoaling had built into his assessment, had it wished to do so. The EA has an entire team of air quality modellers⁶⁰ at its disposal. As Mr Kirk conceded (XX) none of the EA’s witnesses involved in the Appeals even asked the air modelling team to undertake this work. Mr Stoaling made clear (EIC and XX) that such an exercise would take at most a day or two to complete, with the time being significantly reduced if more than one modeller was allocated to the task.
76. The EA’s own guidance characterises risks of this magnitude as extremely low and well below the threshold which the EA adopts to determine a “minimal” level of risk for non-threshold carcinogens,⁶¹ which states: “For compounds which are genotoxic and carcinogenic, and for...substances where no...threshold for effect had been identified, it is currently considered prudent to assume that no threshold for adverse effect exists. The current UK approach is to reduce exposure to these chemicals to ‘as low as reasonably practicable’ and to apply the management of risk individually to each substance or source. An ELCR of 1 in 100,000, derived from relevant human studies, is considered representative of a minimal risk to human health.”

⁵⁷ See paragraph 7.1.51 of Dr Cole’s POE (CD6/1/B);

⁵⁸ *ibid*

⁵⁹ See paragraph 7.1.53, *ibid*.

⁶⁰ Albeit neither Mr Lowe nor Mr Kirk are modelling experts (accepted during XX of both witnesses).

⁶¹ See CD1/IQ1/AC: Consultation response document: new EALs for emissions to air, dated 3 September 2021.

77. To be clear, Dr Cole has not proposed that an 'EAL' should be set for asbestos emissions based on his risk assessment⁶². In response to XX, Dr Cole explained that his reference to the EA's adopted guidance⁶³ regarding the risk threshold, which is utilised by the EA when setting EAL's for non-threshold substances, was being used as a tool to demonstrate the comparable degree of risk from the Appeal Proposals.
78. The assertion (during XX of Dr Cole) that Dr Cole's assessment of risk is somehow 'incomplete' because the AERMOD dispersion modelling is not able to take into account the effects of 're-suspension' was unsupported by any objective evidence and takes the EA's case no further forward. As Dr Cole opined (RX) the theory posited on behalf of the EA fails to have any regard to: i) real world conditions; or ii) the entirely competent and thorough assessment which Dr Cole undertook regarding the relative contributions to fugitive emissions of the different activities comprised in the Proposed Activity⁶⁴.
79. Firstly, the theoretical example of an asbestos fibre being 'stuck to a tree' and then being re-suspended by high winds, fails to understand that the risk of any such asbestos fibre being released so that it could become 'stuck to a tree' as a result of the Appeal Proposals is so small as to be negligible. It ignores entirely the fact that we do not live in an 'asbestos free' environment 'save for' the Appeal Proposals. This is no sound basis upon which environmental permitting decisions could or should be made: it pays no regard at all to the actual level of risk posed by the activity being considered and assessed.
80. Secondly, as Dr Cole sets out in his evidence, the risk of asbestos fibre emissions being released (as per the hypothesis posed) for activities in connection with the Appeal Proposals is not avoided or prevented if the 'mechanical screener' element of the treatment process is either fully enclosed or located within a 'suitable' building⁶⁵. That hypothetical risk (a fugitive release of a fibre, which becomes stuck to a tree and is 'resuspended' in high winds) remains as a result of material transfer, which will take place with potential for 'tracking out' (of very low numbers of asbestos fibres) to occur in any event. The position adopted by the EA on this issue is an exercise in futility.
81. Thirdly, it does not assist the EA with its primary case. There can be no doubt that the EA's central contention is that the mechanical screener should be "enclosed" because the operation of the screener results in deposits of soil containing asbestos fibres on the concrete pad. This borders on the nonsensical when one understands that the EA accepts that the entirety of the

⁶² This is a point which was put to Dr Cole in XX.

⁶³ And the thresholds set by other regulators for non-threshold substances.

⁶⁴ See, for example, paragraph 4.1.8 and 4.1.9 of Dr Cole's POE (CD6/1/B)

⁶⁵ See paragraph 4.1.9 of Dr Cole's POE, *ibid*.

treatment process, including depositing soils containing bound ACMs to provide a stockpile to feed the picking station on the treatment pad, can be carried out without 'enclosure'. There is no evidence whatsoever which would justify a conclusion that the operation of the screener on an outdoor treatment pad increases, in any material way, the soil which is deposited onto it. Once again, it also ignores the 'real world' effect of the important operational controls which will be deployed as part of the Appeal Proposals, including dampening down and cleaning of the surface of the treatment pad (which Dr Cole does not take into account in reaching his conclusion of negligible risk).

82. Dr Cole's exemplary approach to the assessment of risk is illuminated by the rigour with which he has undertaken sensitivity testing throughout his evidence. Taking the 'standard' approach to soil sampling (which reflects the LOQ), Dr Cole makes clear that there is simply no evidence, from the extensive data available, to demonstrate that the use of the mechanical screener has the effect of increasing the amount of 'free fibres' in the soil. Using this assessment method, the data demonstrates overwhelmingly that the mechanical screener has no impact on the fibre content of the soil: that fibre content is below the non-hazardous threshold before it is processed; it remains below the non-hazardous threshold after it is processed.
83. However, Dr Cole's evidence goes on to undertake additional sensitivity testing of pre and post treated soil at Maw Green in August and September 2023. In effect, the process involves a much more sensitive test method⁶⁶ and even at this level of granularity, the results do not provide a reasonable foundation for the assertions of the EA that mechanical screening of the soils containing bound ACMs is likely to materially increase the free fibres present in the soil (compared to pre-processing). As Dr Cole clearly explained (RX) the results of the testing have to be viewed in their appropriate context. Firstly, as Mr Raynes agreed (XX) an increase in fibres in the soil in itself does not, necessarily, present an unacceptable risk. The key question is the magnitude of the increase, taking into account the quantum of fibres (and risk posed by that quantum of fibres) which were already present. Secondly, as Dr Cole explains there is inevitable uncertainty in the results, given that the testing methodology has to rely on a process which identifies fibres below the LOQ.
84. The attempt of the EA to rely on the data set out in Table 2.3, Figure 2.2, Figure 2.3 and Figure 2.4 of Dr Cole's Factual Monitoring Data Report (CD/6/1/D) in an effort to demonstrate that the use of a mechanical screener results in a material increase of asbestos fibres released to air is similarly doomed to failure. As Dr Cole cogently explained (RX), when viewed in its proper context, there is no reasonable basis for the conclusion that the operation of the screener at ERQ resulted in more asbestos fibres to air than without. The EA's approach seeks to rely on a partial understanding of the data presented, which fails to have regard to complete picture.

⁶⁶ See paragraph 6.110 of Dr Cole's POE (CD6/1/B).

Again, it is the inability of the EA's witnesses to understand the evidence of Dr Cole which is the driver for their 'concerns' in this respect.

85. In the final analysis, there is no evidential basis to conclude that the Appeal Proposals will result in any failure to comply with the EA's adopted guidance (M17)⁶⁷ which requires that exposure to asbestos fibres should be kept, "as low as possible and asbestos should not be found above background levels at the site boundaries". As Dr Cole opined (EIC) background levels of asbestos are, in effect, determined by the LOQ for regulatory purposes. This is of course consistent with the approach taken by the EA to: i) setting an EAL for point source emission limits of 0.1 f/ml (which the EA has imposed on V10 of both the Maw Green and the Daneshill Permits (and, indeed, the permits granted by the EA for other sites)); and ii) the boundary control level (0.01 f/ml). The evidence of Dr Cole provides a robust and comprehensive assessment which demonstrates the emissions measured 'at source' are several orders of magnitude lower than either of these control limits. At such, it is inconceivable that the Appeal Proposals would result in any conflict with the guidance in M17.
86. It is fair to characterise the XX of Dr Cole, attempted in the absence of any objective evidence to support any challenge to his expert assessment of both the data and risk, as highly adventurous and entirely unsuccessful.
87. Dr Cole's authoritative and expert evidence stands, at the close of the evidence before the Inquiry, unchallenged (in any meaningful way). It comprehensively demonstrates that the level of risk posed by the waste, which will be treated by the Appeal Proposals, to be so low as to be negligible.

Air Quality and Particulate Matter

88. Mr Lowe's evidence to the Inquiry was something of a curiosity (to describe it benevolently) and was wholly characterised by a series of generalised assertions⁶⁸ bearing little or no relevance to the facts relevant to any of the Appeals.
89. The EA's case, in so far as it was indeed advancing one, regarding particulate matter emissions remains entirely unclear to the Appellant. The EA has advanced no quantitative assessment of air quality impacts and its 'concerns' regarding Mr Stouling's dispersion model are difficult, if not impossible, to reconcile with the fact that Mr Kirk plainly conceded (XX) that the dispersion factors derived by Mr Stouling (via the model) were accepted by the EA.

⁶⁷ CD1/N

⁶⁸ This was repeatedly conceded by Mr Lowe in XX.

90. During EIC Mr Lowe introduced (for the first time) an appeal decision relating to air quality matters at a site at Thames Wharf, in London (IQ9/7/A). He was unable (in XX) to cogently explain what, if any, relevance this could have to the determination of the Appeals. Mr Stoaling (EIC) concisely and clearly advised the Inquiry that the Thames Wharf case was entirely irrelevant to any of the Appeal Proposals: i) it related to an area designated as an AQMA; ii) the activity was known to be a heavy dust emitter, with activities including crushing and grinding, and a long history of substantiated complaints. By contrast, neither the Maw Green or Daneshill are designated AQMA's and, in relative terms, the Appeal Proposals are not expected to be 'dusty' activities. Mr Stoaling averred that he was entirely unsurprised by the decision in the Thames Wharf case and he supported (in principle) the Inspector's decision in that case.
91. Attempts to challenge Mr Stoaling's approach to the assessment of particulate matter (either in its own right or as a physical 'proxy' for asbestos fibres) were entirely unconvincing. Firstly, the primary purpose of Mr Stoaling's evidence was to determine dispersion factors and in that respect, the case is relatively unusual; the air quality evidence submitted by the Appellant does not deal with assessment of harm/risk – that is squarely addressed in the evidence of Dr Cole.
92. In that context, debates (instigated by Mr Lowe) regarding the alleged failure to include receptors on the PROW within the Daneshill landfill site (Appeals One and Two) were, in effect, irrelevant and unhelpful. In any event, as Mr Stoaling explained (XX) the receptors shown on drawing AQ1DH⁶⁹ provide an effective 'proxy' for footpath receptors. More importantly perhaps, Mr Stoaling maintained that in respect of particulate matter, any receptors on the footpath would be screened out of any assessment (should one be needed) in accordance with the methodology in CD1/3/MS5 (page 19, Box 1-1).⁷⁰
93. The EA's case with respect to air quality (whether as a result of 'deposited dust' or particulate matter) was entirely unsubstantiated. Mr Stoaling's evidence regarding the derivation of suitable dispersion factors stand unchallenged and, indeed, expressly accepted by Mr Kirk (XX).

Best Available Techniques

94. Following the examination of the evidence at the Inquiry, the EA's position with respect to BAT has been the subject of a number of important concessions. It should be noted that the Appellant repeatedly advised the EA⁷¹ that it was practically impossible to 'fully enclose' a

⁶⁹ See Mr Stoaling's Appendices (CD6/4/C)

⁷⁰ See Mr Stoaling's POE, paragraph 2.30 and footnote 9 (CD6/4/B)

⁷¹ In its formal submissions to the appeal process (Grounds of Appeal; Rule 6 Statements and Written Comments (see CDx-x)) and in the Appellant's submissions to the EA in an effort to discharge the pre-operational condition at ERQ.

scrubber. Finally, on the morning of 2 May 2024, this point was conceded by the EA, throwing the bold submission at paragraph 4 of the EA's Opening Statement⁷² into stark relief.

95. Furthermore, the EA has finally accepted that it is not necessary, even on its own case, for the mechanical scrubber to be both 'fully enclosed' and sited within a 'suitable building'. The persistent adherence of the EA to the 'double bubble' requirement has, finally, been relinquished at the 11th hour.
96. Ms Heasman's evidence on the proper interpretation and application of BAT, both in written form and before the Inquiry (EIC/XX/RX) was a model of clarity, precision and thoroughness. She was the only expert witness to provide a full assessment of the Appeal Proposals compliance with BAT predicated on a proper understanding the nature of the activities which the Operator and the Appellants wish to undertake. Figure 3 of Ms Heasman's main POE (CD6/2/A) provides a helpful schematic to aid the decision maker's understanding of precisely what is being proposed by the Appellants.
97. Crucially, Ms Heasman was the only expert to: i) provide a detailed assessment of the compliance of the Appeal Proposals with key legislation including BAT⁷³; and ii) to fully understand and directly engage with the balancing process which the determination and application of BAT requires. As Ms Heasman correctly advised the Inquiry, the application of BAT cannot be divorced from a clear understanding of the risks posed by the waste under consideration.
98. There are no 'industry specific' BAT requirements which have been determined to apply to the physical treatment of waste such as that proposed by the Appeal Proposals. Accordingly, the applicability of general measures set out in BATC (CD1/Z) and the relevant Appropriate Measures guidance must be carefully considered to answer the question of 'what is BAT' for the Appeal Proposals and, more specifically, what constitutes BAT in respect of the use of a mechanical scrubber to treat soils containing bonded ACMs.
99. As already referred to earlier in these submissions, Ms Heasman opined that the determination of BAT could not be divorced from a proper understanding of risk (RX). On this point alone, the EA's case to the appeal fails at the first hurdle as its witnesses failed entirely to undertake or take into account any assessment of the risk posed by the waste to be treated. There is no way for the EA to escape the inevitable conclusion that with respect to the potential release of asbestos fibres there is, quite simply, no material difference in the risk posed by the waste

⁷² IQ9/10/B

⁷³ See Table 2 of Ms Heasman's main POE (CD6/2/A)

compared to non-hazardous soil. This uncontested fact exposes the fault line which runs through and fundamentally undermines the EA's case to these Appeals.

100. The dogmatic approach adopted by the EA, which characterised its case on the compliance of the Appeal Proposals with BAT14d, is in direct conflict with its own guidance (CD1/T), the wording of BATC generally and in specific reference to BAT14d, and the overall aims of the IED to ensure the best 'overall' environmental outcome is achieved.
101. Section CD1/T states, in terms, that: "Where a measure is not suitable, an operator can propose alternative measures that achieve the same level of environmental protection. Or they can provide an explanation of why the specific measure is not relevant". In the present case, with respect to BAT14d and the 'enclosure' of the mechanical screener, the Appellant has done both.
102. As Ms Heasman explained (EIC) the EA's relentless obsession with the 'prevention' of emissions in these Appeals is both incorrect (in terms of the appropriate approach to the determination of environmental permits) and misguided on the facts. Even where an activity is 'enclosed' in a building, which is hermetically sealed and emissions captured and directed to a HEPA filter (or similar) this does not achieve 'prevention' of emissions to air. Filtration systems are not 100% effective and accordingly residual emissions are, in effect, allowed for by way of point source discharges. In the present case, the EA has (on its own case) accepted that a point source discharge of air to the atmosphere is permitted to contain asbestos fibres up to 0.1 f/ml.
103. In terms of 'equivalence' therefore, the EA's proposed 'enclosure' of the screener within a 'suitable' building achieves no betterment. Dr Cole's evidence, as to the emissions actually released to air by the Appeal Proposals, demonstrates that those emissions are several orders of magnitude less than what would be permitted to be released to the atmosphere by the EA's point source emission.
104. With this firmly in mind, Ms Heasman's evidence to the Inquiry emphasised the need to undertake a careful and considerate balancing exercise between: i) the benefits which would be offered by any application of BAT14d; ii) weighed against the environmental disbenefits which may arise from the application of the particular technique in mind.
105. Given the concession of the EA, the question of 'availability' of a fully enclosed screener is no longer in dispute between the parties. It now positions its case firmly on the assertion that the risk posed by the mechanical screener is so significant that it justifies the requirement of 'enclosing' the mechanical screener within a building, with emissions from the same to be 'captured' and directed to a HEPA filter/point source emission.

106. At no point has any witness, called on behalf of the EA, taken into account or considered the environmental disbenefits which would arise from its insistence that a building be constructed on the appeal sites. In contrast, Ms Heasman has expressly assessed this in her overall balancing exercise which leads her to the conclusion that 'enclosure' within a building is neither justified nor in the wider interests of the environment taken as a whole. Ms Heasman's evidence on this point was not subjected to any successful challenge, and as such her conclusions retain their full force.
107. In short, it is inescapable that the construction of a building will result in adverse environmental impacts that will not arise should the Appeals be allowed. Appendix F of Ms Heasman's appendices (CD/6/2/B) provides a life cycle carbon assessment of the buildings which would be required to be constructed on both of the sites, should 'enclosure' be required. The point is however a simple one: there will inevitably be greater environmental impacts as a result of undertaking building construction works (including foundations) compared to permitting the Appeal Proposals to take place on a 'treatment pad'.
108. Ultimately, as Ms Heasman made plain to the Inquiry (EIC/XX/RX), to blindly insist on the provision of a building, in circumstances where it would deliver no tangible benefits by way of the reduction of emissions to the environment from the regulated activity, not only defeats common sense but would actually amount to a breach of the requirements of the IED itself. The EA has failed to comprehend the entirely illogical position it has adopted to this Inquiry and has allowed its decisions to be dictated by an unerring, but inexplicable, commitment to what it considers to be its 'strategic direction' of enclosing all waste facilities, irrespective of risk.

Conclusion

109. Having regard to all of the above, the Appellant respectfully invites the Inspector to uphold all three of the Appeals.

Alison Ogley
Partner
FREETHS LLP
3 May 2024

APPENDIX ONE

1. This note sets out the details of notification of the appeals APP/EPR/636, 651 & 652 by FCC Recycling (UK) Ltd and 3C Waste Ltd by way of site notices posted at or near the Installation sites, or directly to interested parties.

EA Site Notices

2. The Appellants requested photos and confirmation of the dates that each appeal notice was displayed by the EA for both DH and MG Sites on 25 April 2024.

Daneshill Soil Treatment Facility

3. Following the request from the Appellants on 25 April 2024, the EA provided details including copies and photographs (one each relating to the sites) of the appeal notices which were posted on 27 February 2024 in the locality of the Daneshill site.
4. The EA also provided copies of correspondence [IQ9/10/K] confirming that the notices were placed 'at various locations' in the surrounding area. The locations detailed in this correspondence are as follows:
 - 4.1. Inside the Sutton cum Lound Village Hall, 38 Town Street, Retford, DN22 8PT
 - 4.2. Daneshill Lakes car park, Retford, DN22 8RB
 - 4.3. Ranskill village notice boards, Retford, DN22 8LE by Parish Councillor 'Robert' where indication was made for the notices to be displayed by the end of the week commencing 26 February 2024
 - 4.4. Ye Old Bell, Great North Road, Retford, DN22 8Q
 - 4.5. The village notice board at Barnby Moor by a local Parish Councillor, 'Claire'; and
 - 4.6. Retford Library, 17 Churchgate, Retford, DN22 6PE
5. The correspondence confirms that the location of the photographs provided were Lound Village Hall, 38 Town Street, Retford, DN22 8PT [IQ9/10/H] and Daneshill Lakes car park, Retford, DN22 8RB [IQ9/10/I].
6. In respect of the Daneshill notices, the EA provided a copy of the 'Certificate of Billposting' dated 27 February 2024, as provided to PINS [IQ9/10/J].

Maw Green Soil Treatment Facility

7. Following a further request from the Appellants on 29 April 2024 the EA provided details of the posting of appeal notices in the locality of the Maw Green site. The EA provided details and photographs of the posting of appeal notices at the following locations:
 - 7.1. Crewe Library, Lifestyle Centre, Moss Square, Crewe CW1 2BB [Figure 7, IQ9/10/T];
 - 7.2. Crewe Town Council, 1, Chantry Court, Forge St, Crewe CW1 2DL [Figure 8, IQ9/10/T];
 - 7.3. Adjacent to the Maw Green site entrance [Figure 9, IQ9/10/T];
 - 7.4. Opposite the Maw Green site entrance [Figure 10, IQ9/10/T];
 - 7.5. Footpaths on Maw Green Road, Ridding Drive, Thorneycroft Way, Remer Street, and Fairhurst Road (new housing estate to the southeast of the site, on the other side of the railway) [Figures 1-6 and 11-14, IQ9/10/T].

8. The notices referenced at 7.3 – 7.5 above were displayed by the EA on 29 February 2024; the notices referenced at 7.1 and 7.2 were passed to respective staff members with the instructions that they must be displayed before 5 March 2024.

EA letter of notification of appeal

9. The EA and Planning Inspectorate confirmed to the Appellants on 29 April 2024 that site notices were not displayed at or in the vicinity of the Daneshill Site in respect of APP/EPR/636 (Appeal One). Instead, a letter titled '*Notice of appeal made under the Environmental Permitting (England and Wales) Regulations 2016 – Regulation 31*' was sent directly to interested parties (who had submitted representations during the determination process which related to Appeal One) on 12 July 2023 [IQ9/10/W].
10. The EA provided a schedule to the Appellants of the interested parties to which the letter of 12 July 2023 was sent [IQ9/10/X], the details are as follows:

- 10.1. [REDACTED]
- 10.2. [REDACTED]
- 10.3. [REDACTED]
- 10.4. [REDACTED]
- 10.5. [REDACTED]
- 10.6. [REDACTED]
- 10.7. [REDACTED]
- 10.8. [REDACTED]
- 10.9. [REDACTED]
- 10.10. [REDACTED]
- 10.11. [REDACTED]
- 10.12. [REDACTED]
- 10.13. [REDACTED]
- 10.14. [REDACTED]
- 10.15. [REDACTED]
- 10.16. [REDACTED]
- 10.17. [REDACTED]
- 10.18. [REDACTED]
- 10.19. [REDACTED]
- 10.20. [REDACTED]
- 10.21. [REDACTED]
- 10.22. [REDACTED]
- 10.23. [REDACTED]
- 10.24. [REDACTED]
- 10.25. [REDACTED]
- 10.26. [REDACTED]
- 10.27. [REDACTED]
- 10.28. [REDACTED]
- 10.29. [REDACTED]
- 10.30. [REDACTED]
- 10.31. [REDACTED]
- 10.32. [REDACTED]
- 10.33. [REDACTED]
- 10.34. [REDACTED]

- 10.35. [REDACTED]
- 10.36. [REDACTED]
- 10.37. [REDACTED]
- 10.38. [REDACTED]
- 10.39. [REDACTED]
- 10.40. [REDACTED]
- 10.41. [REDACTED]
- 10.42. [REDACTED]
- 10.43. [REDACTED]
- 10.44. [REDACTED]
- 10.45. [REDACTED]
- 10.46. [REDACTED]
- 10.47. [REDACTED]
- 10.48. [REDACTED]
- 10.49. [REDACTED]
- 10.50. [REDACTED]
- 10.51. [REDACTED]
- 10.52. [REDACTED]
- 10.53. [REDACTED]
- 10.54. [REDACTED]
- 10.55. [REDACTED]
- 10.56. [REDACTED]
- 10.57. [REDACTED]

Details of Site Notices as provided by FCC

11. The Appellant has displayed the following notices:

- 11.1. Maw Green Notice 1: 11 March 2024 display of a site notice, by the Maw Green Site Business Manager;
- 11.2. Maw Green Notice 2: 28 March 2024. Photographs MG1 [IQ9/10/L], MG2 [IQ9/10/M], MG3 [IQ9/10/N] and MG4 [IQ9/10/O] show this 'notice 2' at various locations in the locality of the Maw Green site;
- 11.3. Daneshill Notice 1: 8 March 2024, as shown by photograph 08.03.2024 DH [IQ9/10/P];
- 11.4. Daneshill Notice 2: 27 March 2024, as shown by photograph 27.03.2024 DH [IQ9/10/Q].

FREETHS LLP
02.05.2024