

IN THE MATTER OF TH CONJOINED APPEALS IN RESPECT OF THE SOIL TREATMENT FACILITIES AT THE DANESEHILL LANDFILL SITE AND MAW GREEN LANDFILL SITE

THE EA v FCC RECYCLING (UK) LTD & 3C WASTE LTD

OPENING STATEMENT OF THE AGENCY

INTRODUCTION

1. The Inspector could be forgiven for feeling a little overwhelmed by the huge amount of documentation which is before the inquiry. From the Agency's point of view, the case is relatively narrow and straightforward. It is trite to observe that asbestos is very dangerous and there is no recognised "safe level" [M17, para 7.4.3, CD7.1.P]. The Agency granted permits which, unremarkably, require containment and abatement in accordance with BAT14d. It is unremarkable because 'containment and abatement' is entirely in accordance with the guidance and it is the approach which is adopted in many other soil treatment facilities (STFs) which the Agency permits.
2. Of course, that does not mean that the appellant cannot be innovative and seek to promote alternative measures. However, the onus lies squarely on the appellant's shoulders to demonstrate with cogent and convincing evidence that its approach will provide an equivalent level of protection to that of BAT14d's containment, collection and abatement of diffuse air emissions. The Agency remains unconvinced by the appellant's evidence. The Agency has repeatedly offered the appellant a trial period to test at the Edwin Richards Quarry whether its approach can be shown to provide equivalent protection to 'containment and abatement' [DK, para 13.4]. The appellant has declined this offer.

THE AGENCY'S UNREMARKABLE APPROACH

3. The Agency's insistence upon handpicking rather than mechanical screening is unremarkable because it is an established method of sorting material. We all know it works (and it is proven to work). Plainly, the sorting of material can be done more carefully by hand than by using a mechanical screener. The latter is more energetic and is bound to agitate and generate more dust particles. This is not only common sense but

is borne out by the appellant's own monitoring data: with no screening going on 20% of samples contained countable fibres, rising to 26% when the mechanical screener was operating with a HEPA filter and 44% when the screener was operating uncovered [PB app2, section 10]. Yet the appellant proposes to undertake this more energetic activity outdoors without enclosing the equipment. That is unlikely to provide equivalent protection to 'containment and abatement'. The Agency accepts that mechanical screening is likely to prove less expensive (beyond the short term) and more efficient (in the sense that the mechanical screening can sort through a greater volume of material) than hand-picking. But, that does not justify sanctioning a permit which is likely to provide a lesser level of protection.

4. It is the appellant's case that it is impossible to enclose the equipment it proposes to use on site because of its size [LH's proof, para 4.42]. This is contrived. The Agency is unsurprised that the appellant struggles to purchase a specifically-dimensioned enclosure "off the rack". It knows from experience that a bespoke enclosure can be ordered and delivered. That is that other permitted-companies do (ie the appellant's competitors). Again, the Agency's approach to the appeal is unremarkable. It only requires of the appellant what many other companies are already doing. To put it crudely: if other STFs can enclose their equipment and use abatement to minimise air emissions in line with BAT14d, the Agency requires some convincing that the appellant cannot (and should not) be held to the same standard [PB app 2].

DISPERSION MODELLING

5. Central to the appellant's case of providing equivalent protection to 'containment and abatement' is the dispersion modelling of MS. Why? The appellant relies upon the dispersion/dilution of fibres provided by the dispersion modelling in order to meet the standards instead of implementing BAT14d. This modelling was provided to the Agency for the 1st time on 28 February 2024 appended to the proof of MS. The officers' proofs were written entirely ignorant of this new evidence. This represents a new front in the appellant's case. This was not evidence which was before the Agency when it granted the permits. The appellant's Daneshill Appeal Statement of July 2023 confirms that dispersion modelling had been undertaken [para 7.32, CD4.1.C]. But the modelling itself was only provided in MS's proof last month. No good explanation has been articulated as to why this evidence was held back until the exchange of proofs. Why did the appellant "sit on" this evidence for over 7 months? It must have known that providing it to the Agency 3 weeks before the inquiry would reduce the scope for meaningful appraisal.
6. Further, for reasons only known to the appellant, contrary to good practice it decided not to reach out to the Agency to try to agree the methodology in advance. The Agency has had very, very little time to consider it.

7. The Inspector will know that parties at inquiries sometimes bandy around allegations like “ambush”. But, here, that characterisation is apt rather than hyperbolic. It is not how planning inquiries ought to work.
8. At the transcribed “common ground” meeting on 29 February 2024 by MS Teams (the day after the modelling was served) the Agency asked for the modelling files which informed its work in order to undertake a full audit of the dispersion modelling. The appellant refused. It declined to provide the raw data and said that if the Agency was concerned it ought to build its own air dispersion model. This was an unhelpful suggestion given the Agency did not have the time or the resources to do so. Nor is it how the process should work. Normally: the applicant builds the model and then the Agency verifies its conclusions and does sensitivity checks. Why the appellant declined to provide the raw data remains unexplained. One might have expected that, if it was confident in its model and its underlying assumptions, it would have no difficulty in providing the raw data to allow its model to be verified. The Agency is troubled by this lack of transparency. So should the Inspector. It means the Agency has been denied the full opportunity to meaningfully audit the modelling. The position, to put it diplomatically, is unsatisfactory.
9. The Agency has considered whether to request an adjournment but, given how long this case has gone on for and the disruption and delay which it would inevitably cause, it has reluctantly decided to keep the show on the road. But that does not detract from the fact that the Agency has not had the opportunity to meaningfully assess and appraise the appellant’s modelling evidence. This places it at a significant disadvantage. The Agency’s witnesses are not in a position to offer firm and final conclusions on the quality and reliability of the modelling. Nor is the Agency in a position to dispute the arithmetic. However, it can articulate some broad concerns about the value of the modelling.
10. MS is at pains to make clear that he has provided “*theoretical emissions rates*” for the sites [MS proof, paras 3.6 & 4.3] and then applied a discount to take account of expected dispersion/dilution (this figure arises from the monitoring data). So, to put it simply, the appellant has reached its “output” by calculating a mix of theoretical and actual data inputs. The Agency is not satisfied that this provides a robust basis to justify the appellant’s permitting proposal. The monitoring data (provided on 8.2.24) cannot be characterised as full or comprehensive. It is limited and is based on samples which contain very little asbestos. The monitoring data comes nowhere near reflecting the reasonable worst case. The appellant has then undertaken a process of assumed estimated and averaged data to reach the output. The appellant has not, in truth, assessed the worst-case and therefore the risk posed by the appellant’s alternative measures. If the Inspector is not satisfied by (i) the accuracy and representativeness of the monitoring data or (ii) all of the assumptions and estimates of the modelling data, the output cannot be relied upon.

11. To put it crudely, for the success of the appeals, a huge amount is riding upon MS's modelling. It is unsatisfactory that this evidence was provided for the 1st time 3 weeks ago and the appellant has declined to provide to the Agency the raw data which underpins it. This does not inspire confidence. It is all the more surprising given that the modelling evidence appears to have been obtained in 2023; MS was instructed in June 2023 [MS proof, para 1.3].
12. In any event there is a well-known adage in the realm of environmental permitting: "*dilution is not the solution*". The Agency remains concerned by the appellant's reliance upon dilution of fibres to minimise the risk.

CONCLUSION

13. The Agency remains firmly of the view that the appellant's contended for approach represents an unacceptable relaxation of control. It has not been sufficiently justified with cogent evidence and the Agency does not consider that it provides an equivalent level of protection to the conventional approach of 'containment and abatement'. This constitutes a retrograde step for the protection of the environment and public health.

JACK SMYTH
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