IN THE MATTER OF:

The Environmental Permitting (England and Wales) Regulations 2016; Regulation 31(1)(f) appeal

BEFORE:

THE PLANNING INSPECTORATE (PINS Ref APP/EPR/684)

Nick Brooks t/a Brooks Demolition and Waste Disposal

APPELLANT

v.

Environment Agency

RESPONDENT

Appeal – Regulation 36 Notice
Permit reference: EPR/EP3798CS
Appellant: Nick Brookes t/a Brooks Demolition and Waste Disposal
Facility: Green Lane, Wardle, Nantwich, CW5 6DB

Appellant's Pre-inquiry Statement of Case

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Glossary

[EA/7]	*This is a reference to the bundle of Appendices to the Environment Agency's Statement of Case. In this example "7" is a reference to document 7 of the EA's appendices.*
[App/C1]	*This is a reference to the bundle provided in support of the Appellant's case. In this example "C1" is a reference to the first document in section C of the bundle.*
EPR2007	Environmental Permitting (England & Wales) Regulations 2007 (s.i. 2007/3538)
EPR2010	Environmental Permitting (England & Wales) Regulations 2010 (s.i. 2010/675)
EPR2016	Environmental Permitting (England & Wales) Regulations 2016 (s.i. 2016/1154)

INTRODUCTION

Procedural

1. This is an appeal brought pursuant to regulation 31(1)(f), EPR2016 against an Environment Agency Enforcement Notice dated 29 July 2024 served under regulation 36, EPR2016 (EPR/EP3798CS) ("the Notice").

2. The Notice relates to the Appellant's permitted facility at Green Lane, Wardle (the Site) now regulated under EPR2016 under permit no. EPR/EP3798CS (the Permit). The Permit (as varied and consolidated into its present form) was issued on 17 August 2011 [see EA/7].

3. The notice of appeal (with its enclosures) was dated 25 September 2024 and was to be dealt with at a Hearing. Following representations by the parties, on 6 March 2025 the procedure was changed to an Inquiry with a new start date of 14 March 2025. This Pre-Inquiry Statement of Case is submitted at the commencement of the restarted appeal.

The issues and the Appellant's response

4. There are three principal issues:

   4.1. First, in relation to Reasons (1),(2) and (4) of the Notice, do they fail to meet the requirements of reg.36(2)(b),(c) EPR2016 because they fail to "specify", i.e. make explicit, the matters constituting the contravention of permit condition 1.1.1, or the steps that must be taken to remedy the contravention?

   4.2. Secondly, in relation to Reason (3), is the EA correct to interpret the Permit on the basis that it precludes the Appellant from processing trommel fines as part of activity A2 (soil processing)?

   4.3. Thirdly, in relation to Reason (4), and only if the Inspector does not agree that Reason (4) fails to meet the requirements of reg.36(2)(b),(c) EPR2016 (see 4.1 above), does the Appellant's EMS include those procedures which it is required to include which ensure that all outputs from the waste treatment process are classified as waste or meet end-of-waste criteria?

5. The Appellant submits that the correct answers to the above are as follows:

   5.1. The answer to 4.1 is "Yes".

   5.2. The answer to 4.2 is "No". Indeed it would be wrong if the EMS were to provide measures to preclude trommel fines from being processed as part of the A2 activity, since on a correct interpretation, the Permit allows trommel fines to be processed within the A2 soil processing facility. Indeed, as of the date of the variation, it was important to the EA's officers that the new Permit should authorise treatment of the trommel fines in the A2 wash plant, since without such a variation, the activity would not be authorised on site. It was the contemporaneous understanding of both the EA officers and the Appellant and his representatives, that this was how the Permit was to be read, and no legislative measure has come into effect since 2011 which requires the Permit to be interpreted any differently from

the way in which it was originally intended to be interpreted by the parties in 2011. In the alternative, the lapse of time since 2011 when the EA has allowed the Appellant to continue with this treatment activity without objection amounts to an estoppel preventing the EA from denying that the Appellant is correct in his interpretation of the Permit. In any event, the time allowed for compliance is too short.

5.3. The answer to 4.3 is that an EMS is not required to contain or establish procedures to ensure that all outputs from the processes on site are "appropriately" (or otherwise) classified as either waste or meet end-of-waste criteria. In any event, the relevant documentation has been submitted to the EA. As EA officers have known throughout the period of their regulation of the permitted site, the Appellant has followed the relevant WRAP Quality Protocol (*Aggregates from inert waste*), with the result that its aggregate products can be regarded as having ceased to be waste and waste management controls should no longer apply.

6. The result of the above is that the enforcement notice should be quashed. By reason of the ambiguities and uncertainties in the Permit, the factual matrix in which the Permit was granted in 2011 needs to be understood to ensure its correct construction. The correct starting point is the historical background to the regulation of the site prior to the date of the variation / consolidation, discussed further below (with some explanatory commentary as necessary).

7. It is notable that in opposition to the appeal, the EA has not relied on any contemporaneous materials from the 2011 period, the first document relied on being a Compliance Assessment Form issued on 4 January 2022 [EA/9], more than ten years after the Permit was issued.

CURRENT SITE OPERATIONS IN OUTLINE

8. Since the date of the current Permit, the Appellant has operated the following three activity types at the site under a single Permit:

A1 – Waste Transfer Station

A2 – Soil Processing Facility

A3 – Composting Facility

9. The waste activities carried at on the site are fully documented in an EMS which has been updated over the years.

10. The status log in table 1.1 provides details of the permitting history.

Table 1.1 – Status log of permit

Status log of the permit		
Description	**Date**	**Comments**
EAWML 50066	10/12/01	Waste Management issued to Nick Brookes for a waste transfer station.
EAWML 50066	02/02/05	License modified: Specific conditions were deleted and replaced.
Application EPR/EP3798CS/V003	23/05/11	Application to vary and consolidate an open windrow composting facility, a soil processing facility, increase the permit boundary and update the permit to modern conditions.
Variation determined EPR/EP3798CS	17/08/11	Varied and consolidated permit issued in EPR format.

11. The site receives mixed waste from the surrounding catchments delivered by the operators own vehicles and by other carriers from the area.

12. The permitted waste activities allow the sorting and storage of waste to facilitate the recycling, recovery and re-use of waste sourced from the local area. The operations include manual and mechanical sorting of wastes and includes sorting and processing of construction and demolition waste to produce building materials, topsoil, hardcore, aggregate replacements and other products which reduce the need to use virgin building materials. During sorting, all recyclable materials are segregated for further recycling elsewhere (e.g. plastic, metals, wood, paper/cardboard and green waste).

THE FACTUAL MATRIX

Historical background

13. Prior to the issuing of the Permit, the Appellant took advantage of an exemption from the requirement to hold a waste permit as set out in paragraph 13, Schedule 3, EPR2007 (a "paragraph 13 exemption" [App/C2]), alongside his waste management licence (and certain other exemptions). The WML, which allowed the Appellant to accept

household, commercial and industrial wastes at the site became an environmental permit on 6 April 2008. (Subsequently, the effect of regulation 103, EPR2010, was to withdraw the availability of the paragraph 13 exemption from 6 April 2012.)

14. The processes at the site were supported by a document described as a *Secondary Aggregate Production Protocol* (version 2.0 - 12 September 2008) [App/A1]. It is uncontroversial, even if not acknowledged by the EA, that the Respondent has been aware of the existence of the Production Protocol since its issue, as well as its subsequent iterations[1], and since 2008 the EA has carried out various inspections of the site where the Appellant's activities have been carried out.

15. The 2008 Production Protocol document detailed how aggregates were manufactured from waste and it included an account of the wash plant process. Version 2.0 was issued in September 2008 in order to include the wash plant process, which had been newly located at the site. (See for instance para.7 which refers to the "new aggregate washing plant" (internal page 2 of 9) as well as the Audit Report Form following the audit on 18 June 2009 [App/A3] (under condition 1.3 of Table 3 on page 2 of 15 and under (7) in the summary on internal page 4 of 19, both of which refer to "the new aggregate washing plant").) The Wash Plant itself is pictured in photograph 7 of the Audit Report Form (internal page 9 of 15).

16. The purpose of the wash plant was explained in the Protocol. It was to enable trommel fines from the controlled waste received at the site of an appropriate character to be submitted to the yard at the rear of the waste transfer station, where they could be washed and mixed with construction and demolition waste separately received (just as today).

17. The overall aim, consistent with the aims of the extant WRAP Protocol [App/C1], was made clear by the 2008 Protocol. It was to identify "which waste streams are best utilised for the production of

[1] Further versions of the EMS, v.7.2 and 7.3 were prepared by the Appellant's consultants dated 12 July 2021 and 21 July 2011, respectively.

secondary or recovered aggregates" (para.2), since "the products have to be fit for purpose and meet the customers' requirements, many of whom are engaged in civil engineering works" (para.5). The products themselves were to be produced "using the new aggregate washing plant", and they were described by reference to nine specifications identified in para.7 (see for instance "WSA Wash grit sand" at i and ii)).

18. In addition, note paras.10-14 of the Protocol:

> "10. The Wardle site has a broad licence and can accept household, commercial and industrial wastes for treatment and storage. The inert wastes suitable for aggregate production are separated from non-hazardous wastes after receipt and processed in the washing plant, crusher and screens to produce the range of products referred to above ....
>
> 14. loads will ... be tipped onto the mixed waste stockpile for sorting in the trommel in the transfer building to enable the aggregate fraction to be transferred to the pre-crushing or washing stockpile [emphasis added]".

19. The Process Flowchart at Appendix A includes a box which contains the text "Soil / Fines / Hardcore Stockpiled for Transfer to Aggregate Washing Site" directly within the column headed "Mixed Waste Stockpile".

20. It is clear, therefore, that since the installation of the wash plant in 2008, the EA's officers have had full knowledge that material arising from the trommel in the transfer station, now known as trommel fines, has been processed in the wash plant for the purpose of making aggregate (and other) materials.

21. On 18 June 2009, when the Respondent's officer, Ms Rachel Argyros, issued her detailed Report Form following the audit of the Site and the new wash plant (see above), she had a full opportunity to inspect the Wash Plant then in situ as well as the Appellant's operations (see pages 1 and 4 of 15).

22. The text accompanying photo.10 explains that "95% of the current feed flow of waste (fines") from the transfer station is sent to the wash plant ... " (page 11 of 15).

23. The caption to photo.11 is "trommel feeding the fines from the transfer station to the aggregate washing plant" (page 11 of 15). The wording of the caption is significant, being a literal account of the process without using a modern (and imprecise) shorthand "trommel fines".

24. Ms Argyros, noting that the transfer station "is a well managed site [sic]", concluded that with the introduction of the trommel fines at the wash plant, the Appellant's operations did not comply with the conditions of the paragraph 13 exemption. Her conclusion was not that the Appellant's operations could not be authorised, rather, her objection appears to have been with the text and limitations of the paragraph 13 exemption.

25. It is useful to explore further the grounds of Ms Argyros' objections on this score and the response of the Appellant's agents:

    25.1. On 3 October 2009 Ms Argyros objected that the Appellant was relying on the paragraph 13 exemption to account for the feedstock used at the site for the final production of aggregates, but "pre-mixing the demolition and construction waste with the waste streams permitted under your site permit … takes the activity outside of the exemption". She went on: "… should you continue to mix all waste streams together then the wash plant and the aggregate manufacturing process would require a permit or potentially a variation to your existing permit" [emphasis added]. This letter suggests that the very purpose of the subsequent variation / consolidation in 2011 requires the Permit to be interpreted to allow the mixing of waste streams from both the transfer station and the A2 (wash plant) activity. So far as Ms Argyros was concerned, the new Permit would cure the deficiency which existed prior to the variation / consolidation.

    25.2. The Report Form which followed the audit on 18 June made the same point as above (see Part Five on page 15 of 15).

25.3. On 15 October 2009 Ms Argyros emailed the Appellant and his representatives, stating that if he wanted "to take on more material then he [would have to apply] for a variation on the permit" (see also an email dated 3 June 2010 [17:05]).

26. Further correspondence followed between Ms Argyros and the Appellant's consultants in which there were detailed deliberations as to the scope of a new permit [App/A4, App/A6 and App/A7].

27. In an Aggregate / Soil Producers Checklist dated 17 August 2010, Ms Argyros made the observation that "there are currently no waste acceptance criteria testing on the fines that are internally transferred from the permitted transfer station to the aggregate wash plant". For the process legitimately to continue, "proposals to expand the permit area and operate the permit rather than an exemption will be required".

28. If this Checklist document is taken into consideration as part of the relevant background when interpreting the Permit, it is clear that the whole site is to be considered as one unit (on which activities 1 through to 3 were authorised) and that any fines from the trommel at the transfer station can be accepted at the wash plant without any further investigation at the point of transfer (and in particular without any WM3 investigation). This means, in turn, that the waste materials permitted to be treated at the A2 (wash plant) activity are not dependent on meeting the waste codes listed in Table S2.2. Wastes identified in Table S2.1 are acceptable at the A2 activity on transfer to the wash plant within the site, since transfer (without more) is permitted internally from the transfer station (via the trommel) to the wash plant. The list at Table S2.2 is to be interpreted on the basis that wastes with these codes which have not been received at the transfer station can additionally be treated at the wash plant.

29. In an email dated 21 December 2010, Ms Argyros repeated that for the Appellant to carry on his operations using waste fines from the transfer station, then "we require your proposals to expand the permit area and operate the wash plant under a permit".

30. These detailed exchanges led to the application for the Permit on 8 April 2011 [App/9].

31. It is understood that the EMS which was submitted with the application was version v.7.1 dated 8 April 2011[2], although the Permit does not identify the date or version of the EMS.

32. It is to be noted that page 21 of 32 of the EMS describes the waste treatment operations as follows:

> "Waste treatment operations
>
> 3.5 Waste Transfer Station
>
> ...
>
> 3.5.1 All other mixed waste will be loaded directly into the trommel screen. … The final output will be clean hardcore for recycling...
>
> Soils Washing Plant
>
> 3.6 The applicant will be operating and maintaining the soils washing facility which accepts inert and non hazardous waste either direct from mineral extractions and operations and from construction and demolition activities or from the on site transfer station" [emphasis added].

33. In other words, the version of the EMS submitted with the application for the Permit expressly anticipated that, as required by the EA, waste from the transfer station would be submitted internally to the Wash Plant. This process reflected the operation of the Site immediately prior to the issue of the Permit (and indeed today). The EMS described the process as demanded by Ms Argyros given the introduction of the wash plant and the forthcoming demise of the paragraph 13 exemption.

[2] The letter from Oaktree Environmental Limited to the Permitting Support Centre with the Appellant's application forms is dated 8 April 2011.

34. It follows from all of the above, that both prior to the issuing of the Permit and at the time of its issuance, the understanding between the Appellant and the Respondent was that trommel fines from material accepted at the Site could be transferred to the wash plant (without further examination or investigation), being but one activity on the permitted site.

35. This contemporary understanding is directly contrary to the recent demands of Mr Iain Storer and Ms Draper that "trommel fines are not permitted to be treated through the wash plant. Activity A2 limits washing to the coded wastes in Table S2.2, which does not include mechanically treated fines from mixed waste processing" [EA/9/138, above *Action 2*].

2011-2023

36. Inevitably there is little documentary material to demonstrate that in the intervening years (i.e. between the date of the Permit and the interpretation by Mr Storer Ms Draper), the Site was regulated as it had been in accordance with the mutual understanding of the parties as to the meaning of the terms of the Permit and the EMS. The fact that there is no such supporting material is consistent only with the operation of the Site as anticipated jointly by the parties, the Appellant and the EA, prior to the 'new' approach by recent officers. In other words, once the Permit was in place, EA officers were content with the washing of trommel fines from the transfer station as part of the A2 activity. If that were not the case, then presumably the EA officers would have started to issue CAR forms shortly after the date of the Permit, asserting that this was not an acceptable form of treatment.

37. See however the CAR issued on 30 June 2021 after an unannounced visit [App/A17]. Immediately following an answer about the testing of "C&D trommel fines", the following is recorded (being the Appellant's representative's answer to questions previously raised):

> "**The inspecting officer asked what the mixed soils and demolition waste was for and its intended use**
> I can confirm that the material is to be processed through the aggregate washing plant and manufactured finished

aggregates for sale as BS standard products into the construction and building industries."

38. This answer met with no objection from the EA.

Trommel fines

39. It is relevant to add that at some point in recent years, the EA has assigned trommel fines (from the treatment of mixed waste) to waste code 19 12 12, whatever their origin and even if the fines, for instance, were to come from material classified under code 17.01 (concrete, bricks, tiles and ceramics).

40. At the time when the wash plant was installed, trommel fines from screened soils was not recognised by the EA as a separate category of waste, and there has never been a statutory measure underpinning any such categorisation which can preclude the operation of the estoppel referred to above and none is mentioned in the Notice. Code 19 12 12 (fines from the treatment of mixed waste) is not a permitted waste type for any activity governed by the Permit (leading to the absurdity in the EA's approach that any sorting / treatment by a trommel would be unlawful).

41. Moreover, there were numerous discussions with the Respondent prior to the time of the application, and it was agreed that the waste types produced on site (including the trommelled fines) were appropriate feedstock for the wash plant. The outputs from the trommel were not considered as final outputs (necessitating classification or coding under waste codes) but mid-process materials consistent with the Protocol flow chart (see above).

42. The point needs to be made that when the permit variation application was submitted to add the wash plant to the Permit, no application was made to add soil materials (which are now known as trommel fines and classified by the Respondent under waste code 19 12 12). This is because there was no intention of accepting waste code 19 12 12 trommel fines from third parties as incoming wastes. The only fines on site were those arising from wastes which had been accepted at the transfer station. Moreover, if the EA had asked for waste code 19 12 12 to be included in the Permit, on the basis

that it would be defined to cover the washing of internally produced fines, then it is probable that this would have been agreed by the Appellant. It would have been a minor addition to the application, which, from the Appellant's point of view, was a means by which the parties were merely formalising what had been discussed with the EA's officers, with whom the Appellant's representatives enjoyed a good working relationship.

PRINCIPLES OF INTERPRETATION

43. By reg.36, EPR2016:

> **36.**—(1) If the regulator considers that an operator has contravened, is contravening, or is likely to contravene an environmental permit condition, the regulator may serve a notice on the operator.
> (2) The notice must—
> (a) state the regulator's view under paragraph (1),
> (b) specify the matters constituting the contravention or making a contravention likely,
> (c) specify the steps that must be taken to remedy the contravention or to ensure that the likely contravention does not occur, and
> (d) specify the period within which those steps must be taken.
> (3) Steps that may be specified in the notice include steps—
> (a) to make the operation of a regulated facility comply with the environmental permit conditions, and
>
> (b) to remedy the environmental effects caused by the contravention.
>
> ..."

44. As to the interpretation of reg.36, in particular what is meant by "specify" and "specified" in reg.36(2),(3), in *Miller-Mead v. Minister of Housing and Local Govt.* [1963] 2 QB 196, Lord Justice Upjohn stated that the general test when deciding whether an enforcement notice satisfies a statutory requirement must be: "does the notice tell him fairly what he has done wrong and what he must do to remedy it?" In respect of the specific provisions of the EPR, "specify" has been

held to mean to "state explicitly" for the purpose of both reg.36(2) and (3), the true focus being what is required to be stated explicitly (see *R.(EMR) v. EA* [2013] Env LR 14, para.22). Further, so far as reg.36(3) is concerned, the specification of the steps to be taken requires the actual identification of the relevant criteria which have to be achieved or the specific steps which the recipient of a notice must achieve (*EMR*, paras.24).

45. When it comes to the construction of an environmental permit, several decisions of the Supreme Court over the last decade are relevant.

46. The essential proposition is that set out in *Lambeth LBC v. SSHCLG* [2019] 1 WLR 4315: "whatever the legal character of a document, the focus [is] to find the natural and ordinary meaning of the words used, viewed in their particular context and in the light of common sense" (headnote). The question is the extent to which it is permissible to venture outside the four walls of the document itself. In *Trump International v. Scottish Ministers* [2016] 1 WLR 85 (which concerned the implication of a term into a consent for the construction and operation of a wind farm) it was said that there had been a degree of harmonisation in the interpretation of different kinds of records, including contracts and public documents (paras.33, 53 and 66), but that "differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation" (para.33); planning permissions were not in some separate category.

47. *Wood v. Capita* [2017] AC 1173 concerned the interpretation of a contract. Whilst the role of the tribunal is to determine the objective meaning of the language of the contract, the nature, formality and quality of the drafting is relevant in determining to what extent the wider context is relevant (para.10). The interpretation of some contracts may only be successfully achieved by a "greater emphasis on the factual matrix" in various circumstances, for instance because of their informality or brevity or because they are particularly complex and lack clarity (para.13). See also *Sara & Hossein Asset Holdings Ltd v. Blacks Outdoor Retail Ltd* in which Lord Hamblen approved the judgment of Lord Hodge in *Wood* at para.29: "…

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning. (3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."

ECHR

48. By Article 1 of the First Protocol to the ECHR ("A1P1"):

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

49. By section 6, Human Rights Act (1) "It is unlawful for a public authority to act in a way which is incompatible with a Convention right". Section 6(3) encompasses both the EA and an Inspector considering an appeal against an enforcement notice.

THE REGULATOR'S CODE

50. The Regulator's Code came into statutory effect on 6 April 2014 under the Legislative and Regulatory Reform Act 2006. See https://www.gov.uk/government/publications/regulators-code, where it is said that it "provides a clear, flexible and principles-based framework for how regulators should engage with those they regulate". See also the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 as amended from time to time, the most recent iteration of the Code being dated April 2014.

51. The following provisions are relevant:

51.1. Provision 1: "Regulators should carry out their activities in a way which supports those they regulate to comply and grow".

51.2. Provision 5: "Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply".

51.3. Provision 6: "Regulators should ensure that their approach to their regulatory activities is transparent".

WASTE, THE MEANING OF WASTE AND THE LIST OF WASTE

52. For the purpose of the assimilated law of England and Wales:

52.1. Art.3(1), Waste Framework Directive, defines "waste" as "any substance or object which the holder discards or intends or is required to discard".

52.2. Art.7, WFD, para.A1 states that "the list of wastes means the list contained in the Annex to Commission Directive 2000/532/EC, as that list has effect in England".

52.3. Art.7, WFD, para.1 states inter alia that "The inclusion of a substance or object in the list shall not mean that it is waste in all circumstances. A substance or object shall be considered to be waste only where the definition in point (1) of Article 3 is met."

52.4. By reg.4, Hazardous Waste (England and Wales) Regulations 2005 (as amended):

> "(1) In these Regulations, *"the List of Wastes"* means the list of wastes established by Commission Decision 2000/532/EC replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste, as amended from time to time"

52.5. The *List of Wastes* includes the following:

> "INDEX Chapters of the list …

19	Wastes from waste management facilities, off-site waste water treatment plants and the preparation of water intended for human consumption and water for industrial use …
19 12 11	other wastes (including mixtures of materials) from mechanical treatment of waste containing hazardous substances
19 12 12	other wastes (including mixtures of materials) from mechanical treatment of wastes other than those mentioned in 19 12 11

THE APPELLANT'S DETAILED GROUNDS OF APPEAL

Reasons (1) and (2) and corresponding 'steps to be taken' as set out in Schedule 1 of the Notice

53. The Notice fails to meet the requirements of reg.36(2)(b),(c) EPR 2016. This is because the Notice fails to "specify", i.e. make explicit, the matters constituting the contravention of permit condition 1.1.1, or the steps that must be taken to remedy the contravention. As the Appellant said variously in his Reasons, the material contents of the notice are "imprecise", "vague" or "not specific enough to respond to". For these reasons the Notice is defective, i.e. it is deficient. (The Appellant does not argue that the Notice as a whole is a nullity because it cannot be considered an enforcement notice at all, it being accepted that Reason (3) meets the relevant criterion.)

54. Provisions 5 and 6 of the Regulators' Code are a useful guide to the level of specification to which the Notice should adhere: given the criminal sanctions which apply in respect of a breach of the Notice, the level of detail to be provided should be without any doubt so that make sure that the Appellant knows how to meet its responsibilities. The EA's *service standards* (in this context the requirements of the Notice) must necessarily be required unequivocally to set out the requisite information and details as to what is expected from the recipient of an enforcement notice by the EA.

55. As to Reason (1), to have told the Appellant fairly what he has done wrong so that he could rectify matters, the EA would have had to identify the particular risks of pollution in respect of which it considered that the EMS is deficient and the precise sources (in respect of "acceptance, storage and treatment"). Additionally, the EA would have had to identify the criteria which have to be achieved so that the Appellant could satisfy himself that its EMS does what is required "adequately". The Appellant cannot know what it has to do to satisfy the EA's stipulated requirement, Schedule 1 referring only to the requirement to implement "appropriate measures". The Appellant is expected to comply with two guidance documents, but what exactly is it in these guidance documents that would achieve the specific outcomes which would satisfy the EA?

56. As to Reason (2), the Notice is defective in complaining that the EMS does not "adequately" describe the activities carried out so as to ensure that only those activities are carried out.

57. The requirement in (2) as articulated is telling, since, in conjunction with (a) in Schedule 1, the Notice suggests that there is uncertainty on the part of the EA as to the activities which the Permit authorises. This is relevant to the question how much of the historical material should be considered in order to understand the factual matrix in respect of which the Permit should be interpreted (see below). The uncertainty suggests that the contemporaneous documents need to be considered by the Inspector.

58. Presumably, however, the EA does have some idea as to the activities which are carried out at the site which it considers are not permitted activities (such as the washing of trommel fines from the transfer station). For the Notice to be fair, it should have identified those activities which are said not to be authorised so that the Appellant can take steps to amend the EMS so that those activities are no longer undertaken or are amended. The Appellant cannot take steps to define the 'limitations' to his activities unless the relevant criteria, or the concomitant outcomes, have actually been identified.

59. In respect of both (1) and (2), the recipient of an enforcement notice should not have to read beyond the notice to try and discover its

aims. In fact the Appellant is only aware of the EA's complaint about the washing of trommel fines as part of the A2 activity as a potential target of Reasons (1) and (2).

Reason (3) and (b) of the 'steps to be taken' as set out in Schedule 1

60. There are two grounds on which Reason (3) should be rejected by the Inspector. The first goes to the construction of the Permit, since the correct interpretation of the Permit shows that the treatment activity identified by the EA under (3) is an authorised process at the site. Secondly, the lapse of years since the time when the Permit was issued until today, during which the Appellant has openly carried out the washing of trommel fines from the A1 activity, amounts to an estoppel: the EA is estopped from denying that the treatment is authorised. The two grounds will be considered in turn below.

61. The Cheshire Waste Team Leader who signed the Notice on 29 July 2024, Chloe Loseby, has not interpreted the Permit correctly. She has not carried out the objective exercise which is necessary to understand the meaning and effect of the wording of the Permit and its overall purpose. This is the exercise now required to be undertaken by the Inspector.

62. As the key factual material as set out in *The Factual Matrix* above shows, when the Permit was issued to the Appellant in 2011, it was drafted inter alia to permit the washing of inert material accepted as municipal waste which had been through the trommel (in practice, construction and demolition waste accepted at the waste transfer station).

63. The Respondent's change of position first manifested itself on the arrival of Mr Iain Storer together with Laura Draper on an inspection dated 16 December 2021 (CAR form 0412384 issued on 4 January 2022 [App/A18]), during which he noted: "trommel fines are not permitted to be treated through the wash plant. Activity A2 limits washing to the coded wastes in Table S2.2, which does not include mechanically treated fines from mixed waste processing" (page 4 of 9).

64. This CAR form had been preceded by form 0394656 which disclosed that the EA had begun a "Trommel Campaign", understood to be the Respondent's response to the problems at the notorious landfill site at Silverdale (Whalley's Quarry). The Appellant challenged CAR form 0412384 in a letter dated 17 March 2022 [App/A19], its succinct narrative account being set out in the section headed "Action 2...", applicable as much today as then.

65. For the purpose of interpreting the objective meaning of the Permit, it is necessary and important to understand the factual matrix in which the agreement was recorded. To what extent should the Inspector examine the history and the contemporary background documents set out above?

66. However, before this exercise is undertaken, the interpretation of condition 1.1.1 of the Permit must be considered. The effect of this condition is to render the contents of v.7.1 of the EMS part of the express terms which the Inspector has to consider. These contents include the matters referred to in paras.31-33 above, in particular the following:

> Soils Washing Plant
>
> 3.6 The applicant will be operating and maintaining the soils washing facility which accepts inert and non hazardous waste either direct from mineral extractions and operations and from construction and demolition activities or from the on site transfer station" [emphasis added].

67. Even without resort to the factual matrix in order to understand the objective meaning of the Permit, this term *expressly* authorises the movement of waste internally from the transfer station for washing at the A2 facility.

68. Returning to the question as to the extent to which the Inspector is required to consider the history and contemporary documentation set out above, and leaving aside the express terms of paras.3.5 and 3.6 as they appear on p.21 of the EMS (v.7.1), the Permit itself is otherwise unclear and ambiguous. As the Supreme Court authorities show, both the quality of the drafting of the instrument in question

and any ambiguity are overriding reasons why a tribunal needs to take into consideration the wider factual matrix. In this case, the meaning and relevance of the contemporaneous documentation over about a key period of two years during the negotiations leading to a permit cannot be laid on one side.

69. First, the Permit itself lacks the usual particulars which might be expected in the Introductory Note, which would ordinarily summarise day-to-day activities at the site in non-expert terms (such as the use of the wash plant). The conditions of the Permit are generally in standard form with little being specific to the site itself.

70. Secondly, the only condition which is site-specific, condition 2.3, lacks detail, is poorly drafted and incomplete. As to this:

    70.1. Condition 2.3.1(a) contains an initial sentence with no meaning.

    70.2. Assuming that "the activities" in the second sentence refers to A1, A2 and A3, then condition 2.3.1 (a) is ostensibly defective since "the techniques and … the manner [of their operations]" specified in Schedule 1, table 1.2 only refers to some general guidance from the EA (*How to comply with your environmental permit*), various documents relevant to the composting activity, the OMP, DMP and limited parts of the EMS. In any event the meaning and relevance of "Application" is unclear. There is nothing in table 1.2 to inform the reader what techniques and manner of operations should apply to activities A1 and A2.

71. Thirdly, there is the uncertainty created by condition 2.3.2, which states that "(a) waste shall only be accepted if … it is of a type and quantity listed in schedule 2 table S2.1 …". Clause 2.3.2 cannot be taken literally because wastes can also be accepted if they appear in table S2.2 and table S2.3.

72. Fourthly, there is the ambiguity created by Schedule 1 as to what "wastes" can be accepted within the three activities A1, A2 and A3, and whether or not these are capable of including waste falling within list of waste category 19 12 12 (now defined by the EA to include trommel fines). Chapter 19 waste is described in the list of

wastes as "waste from waste management facilities …", and on a proper construction of Art.3(1) and 7, WFD, this would have to be material *discarded* by a waste management facility, suggesting some other (third party) facility and not the Appellant. Further, wastes permitted for the A1 activity within the list at table S2.1 inevitably change their character and status after they have been received at the facility, so that it would be absurd and illogical to seek to re-code the material mid-process when there is no reason to do so. The Appellant's construction is consistent with the aims and purposes of the EA officers when requiring the variation application, in particular the mixing of trommel fines from the A1 process with other waste streams at the (A2) wash plant on an expanded site as part of the Appellant's aggregate manufacturing process. The Permit excludes 19 12 12 fines (as defined by the EA) from any extraneous source, but not fines material transferred from the A1 to the A2 activity. It is understood that the Respondent, on the other hand, seeks to argue, on a strict interpretation of the Permit, that the A2 activity under Schedule S1.1 is limited by reference to the materials falling within table S2.2, which have not lost their initial character as waste when initially accepted at the site under an authorised description, but that at the same time they should be described as 19 12 12 during the process.

73. These ambiguities and uncertainties can only justly be resolved by considering the full factual matrix including the historical background. The iterative process advocated by Lord Hamblen is appropriate. The Inspector can test which construction of the Permit is appropriate by returning to it to consider whether the EA's present interpretation is correct, or whether the Appellant's interpretation is correct given the full factual matrix (as indeed it is).

74. As to the nature of a waste permit, since the type of document under consideration is relevant to the question of the manner of its interpretation, it is admittedly a public document (in the sense that it can be read on a public register), but it is personal to the operator. A party who wants a permit transferred to him, for instance, must demonstrate that he is "competent". A waste permit is not like a

lease which can be assigned without amendment or reassessment since it can be reviewed and varied unilaterally by the regulator.

75. Ultimately it is more likely than not that after their extensive discussions, the EA officers and the Appellant fully understood what was authorised according to the Permit, leading to a lack of precision in the final drafting of the document when it was issued.

76. It follows that the history prior to the issuing of the Permit, the operations undertaken on site in accordance with the Permit as originally issued on 17 August 2011, and also its subsequent operation for many years (undertaken openly and with the full knowledge and consent of Respondent's officers) are important and constitute the relevant factual matrix.

77. As to Reasons (3) of the Notice, therefore, it is admitted that the EMS "does not provide measures to prevent trommel fines from the treatment of mixed waste (19 12 12) being processed through the soil processing facility, activity A2". It does not do so because trommel fines from the A1 activity can be processed within the A2 activity on site: this was the purpose of the original variation / consolidation and the Permit can and should be interpreted in this way. If trommel fines were being imported as waste from some other (third party) waste management facility, then this construction could not be supported, but this is not the EA's allegation.

78. Further to the above, the EA's current interpretation would lead to the absurd result that the activity, which has been unchanged since the issue of the Permit (and indeed since in its earlier iterations), would have to be interpreted as illegal. It would also be contrary to the waste hierarchy and the operation of the Regulator's Code, result in the redundancy of workers, leave gaps in the market for the receipt of waste material and the supply of end-of-waste material and have a significant detriment on an effective business in the area, all without any evidence of any impact on human health and the environment (see Art.13, WFD): all of these are absurd results. The approach of the ECJ in *Porr-Bau GmbH* (C-238/21, 17 November 2022), which supports the circular economy and promotes end-of-waste determinations, should be followed.

79. Further, it understood that it is the Respondent's position that if waste is to be moved from the waste transfer station to be used as a feedstock in the A2 soil processing facility, then it must be re-tested in accordance with WM3 in order to establish the correct waste code. (The aim is presumably an attempt to force the Appellant to conclude that trommel fine material under code 19 12 12 (mixed waste) is being submitted to the facility, which is not within Table S2.2 as a permitted waste.) This procedure would have to be sanctioned by the express wording of the Permit and it is not. In any event it would be absurd to be expected to re-test material, since WM3 is designed to establish whether an operator's duty of care is being met. The Appellant does not owe itself a duty of care when moving waste around a site. Where should this practice end? The suggestion has absurd results since it could mean numerous interventions at different points on a site.

80. Turning to the estoppel, the conduct of the Respondent in issuing the Permit in its current terms and since 2011 has been such that the Respondent is estopped from denying that the Appellant is permitted to receive trommel fines from the waste transfer station (A1) activity and to submit those fines to the Wash Plant. As the Appellant has said in its original notice of appeal, "the regulator has changed its interpretation of the site's environmental permit ... [in a way which is contrary to] the way in which it has been operated since the permit was varied". This estoppel is tantamount to the equivalent of a legitimate expectation on the part of the Appellant that since the issue of the Permit it can process trommel fines from the waste transfer station activity and wash them in the Wash Plant.

81. In conclusion, the requirement in Reasons (3) of the Notice is not justified. There is therefore no justification for the requirement implied at 1.1.1(1)(b) of Schedule 1 that the Environmental Management System (EMS) should be revised to prevent the processing and treatment of trommel fines. The period allowed, in any event (to 13 September 2024) was far too short.

Reasons (4) and corresponding 'steps to be taken' as set out in Schedule 1 of the Notice

82. As to (4), an EMS is not required to include procedures "to ensure all outputs from the waste treatment process are appropriately classified as waste or meet end of waste criteria". The suggestion is supported neither by the Core Guidance [EA/2] nor the Environmental Management System guidance [EA/4]. The WRAP QP is an effective end-of-waste document which is separately met by operators, requiring a detailed system of sampling and testing, and operators already have a set of duty of care requirements which are well understood and with which they comply. To replicate the same set of material within an EMS, if that is the EA's intention, would be to duplicate work and represent a gross breach of Provision 1 of the Regulators' Code. It would be a grossly disproportionate approach to condition 1.1 of an environmental permit, a breach of which would place an operator at risk of the EA's sanctions and would be likely to result in the expenditure of unnecessary time and cost, such as in objecting to contentious aspects of CAR forms (as to which see *R. (Suez Recycling and Recovery UK Ltd) v .Environment Agency* [2024] Env LR 19). Condition 1.1.1 is concerned to minimise risks of pollution during operations on site: the requirement to add procedures in an EMS to show the how end-of-waste is met does not fall within the scope of condition 1.1.1 and would represent a form of regulatory overreach.

83. Further, Reason (4) fails to identify the relevant criteria which have to be achieved or the specific steps which the Appellant should adopt. What "procedures", or what criteria appropriate to those "procedures" need to be adopted, and by what standard are they to "ensure" that they "appropriately" classify waste or meet "end-of-waste criteria? The EA knows what products are manufactured by the Appellant and there is no reason why it should not identify the necessary outcomes if it considers that the Appellant's procedures are inadequate.

84. In any event, relevant documentation has been submitted to the EA.

Conclusion

85. For the reasons set out above and because the requirements of the Notice would represent a breach by the EA of Appellant's A1P1 right

to the peaceful enjoyment of his property (see para.48 above), the appeal should be allowed and the Notice quashed.

86. Time should be extended for compliance with any requirements of the Notice which the Inspector may uphold.

87. An award for costs against the Respondent should be awarded on the grounds that the Respondent has behaved unreasonably and thereby put the Appellant to unnecessary expense.

Gordon Wignall
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2 May 2025