

CW5 6DB, NICK BROOKES

APPEAL REFERENCE APP/EPR/684

Appeal by Nick Brookes against an Enforcement Notice issued under Regulation 36.

APPELLANT'S OPENING NOTE

'Uncertainty'

1. The Notice suffers from 'uncertainty'. Much, if not all of it, "misfires" (to use the language of Upjohn LJ in *Miller Mead*).

What is the correct construction of the permit? Are 'trommel fines' 'unpermitted' or not?

2. The EA's officer is wrong to state that the permit has a 'logical' interpretation which does not require consideration of the factual matrix, in this case the pre-variation application facts. This is contrary to the case law. This permit cannot be interpreted on its own.
3. The wash plant commenced operation in 2007 with WRAP funding. The earlier WRAP document shows that a WRAP Protocol strikes a balance between producers of aggregates and the EA as to the practical definition of waste and when a substance ceases to be waste.
4. It is clear that in 2011 there was an accommodation between the EA and the Appellant. The EA officer, Rachel Agyros, was concerned that the para.13 exemption did not allow the inputs from the transfer station into the wash plant. She also thought that there was a 'duty of care' issue. Her solution was a permit variation to encompass the whole of the site. The permitting officer drafted the permit accordingly and this was accepted by the Appellant.
5. N.b. the usual duty of care considerations are intended to ensure that waste leaving one site to go to another receiving site (such as a landfill) is correctly classified so that it can be safely processed. The Appellant does not receive trommel waste from third parties.
6. The effect of the permit variation was that there is no requirement to test material from the static trommel part-way through the process. In any event 'trommel fines' did not exist as a general categorisation of 19 12 coded waste, and it still does not appear as a category of waste in the List of Wastes. There has been no legislative measure resulting

in the existence of such a waste classification, although it has its uses in taking a view about trommel material going to landfill (see the evidence of Mr Pearson).

The Appellant's processes are safe

7. It is not surprising that the Appellant is permitted to process material without mid-way testing:
 - 7.1. The Appellant has robust acceptance procedures
 - 7.2. He is a competent operator and can be trusted to oversee operations, in particular on the A2 site (when the trommel materials leave the A1 site).
 - 7.3. The wash plant is a relatively sophisticated process.
 - 7.4. There is ample testing at the stage at which the aggregates etc are deemed to become product. (See page 5 of the second WRAP Protocol.)
8. There are no recorded issues in the intervening 10 years before the 'trommel campaign' emanating from concerns about gypsum.

What of the risk of pollution

9. The Appellant repeats the above.
10. The EA has not relied on any sampling or test results to show a 'real' risk of pollution, i.e. one which relies on a recognised system of risk assessment (likelihood and harm).
11. Suggestions from the EA that there are real risks should be treated with caution and dismissed.
12. The EA has the right to obtain all tests undertaken and all site documentation. It is understood to have received this material or at least a substantial amount of it.

The EMS

13. The Appellant's consultant is correct that there is no requirement to include WRAP testing procedures in an EMS. To include this in an EMS would amount to regulatory overreach.
14. The EA's real complaints are about breaches of permit condition 2.1.1. It is not understood why permit condition 1.1.1 should be engaged. In this sense too it can be said that the Notice misfires.

GORDON WIGNALL

11 November 2025