

Appeal reference APP/EPR/684 (ENV/3353252)

Closing submissions on behalf of the Environment Agency

Introduction

1. These closing submissions should be read together with the EA's opening submissions, which they do not repeat.¹ The Inspector also has the EA's statement of case (CD1.1), comments (CD1.4), proofs of evidence and oral evidence.
2. The structure of the EA's (and Appellant's) opening submissions is followed. The first issue is whether the EN is defective and, if so, what should be done about it. The second issue is whether the EP allows the Appellant to do what he is currently doing, which is fundamental and arises for determination by the Inspector. The third issue incorporates the second issue, and asks the related question of whether the Appellant is adequately addressing the risks of pollution caused by his operations in his management system documents.
3. It is appropriate to set out a number of points by way of introduction.
4. First, it cannot sensibly be disputed that mixed construction and demolition or municipal waste streams – the kind of 'skips' that the Appellant processes at the Site – are problematic. They are highly variable in nature and often contaminated. The findings of the EA's trommel fines campaign are significant in this respect (JP paras. 17-21). Trommel fines derived from such mixed wastes have the potential to display carcinogenic and ecotoxic properties, posing a risk to human health and the environment if not managed

¹ These submissions also use the same abbreviations as the EA's opening submissions.

properly. This risk applies both to management onsite and where trommel fines are used to produce aggregates: *“as [the] material can end up in the environment with no containment, giving a clear pathway to environmental pollution such as land contamination or pollution to ground or surface water”* (JP para. 17). As JS said at the inquiry, the risks may not be immediately apparent, it is long-term and cumulative, due the persistence of some of the contaminants in the environment (para. 29 and Ex).

5. Second, the above gives rise to the application of environmental principles in this case. First, the precautionary principle – i.e. *“a risk-management tool which can be used where there is scientific uncertainty regarding a suspicion of risk to human health or the environment, and which allows preventive measures to be adopted before that uncertainty is dispelled”* (Verlezza, CD10.8, para.AG72). Second, the principles of prevention and rectification of pollution at source – steps should be taken to prevent pollution where the potentially polluting material is produced. The waste hierarchy is relevant, but does not override environmental protection. Recital (6) of the WFD (CD9.7) provides that:

“The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy” (see also Art. 13²).

6. Third, the EA’s approach to regulation at the Site prior to the issuing of the EN on 24 July 2024 cannot have come as a surprise to the Appellant (cf. NB roundtable). Issues with the mixing of trommel fines in the wash plant go back to at least 2009. However, the present concerns with the Appellant’s activities and in particular the scope of the EP were raised in December 2021 (CD.5.6). The CAR form following the site visit of 14 September 2023 (CD5.8) clearly raises both issue with the EP and the risk. This was challenged by the Appellant (CD8.16), but the CAR form was upheld (CD8.19).

² That provides that waste management must be carried out *“without risk to water, air, soil, plants or animals”*.

7. Fourth, the Appellant's response to the issue being raised has been to dispute the entitlement of the EA to raise it and assert that the EP allows him to do what he claims historically to have done – i.e. to process trommel fines from mixed waste in the wash plant without any additional controls beyond (i) initial acceptance criteria on imported waste and (ii) testing of aggregates produced and/or of material sent to landfill. The Appellant has therefore consistently refused to take any further steps either to address the breach of the EP or the environmental risks.
8. Fifth, it is not appropriate for the Appellant to rely upon an EA initiated permit variation (MM para. 65). As JS explained (Ex and Insp Q), the EA would only vary a permit of its own instigation where an existing permit was obviously defective in some way. However, the EA has consistently advised the Appellant that if he wishes to process trommel fines from mixed waste in the wash plant he may submit an operator-led variation application. It is far from guaranteed that this will be granted so as to allow him to process all of the material he currently does in the same way that he currently does. Nor would he be able to rely up on the WRAP Protocol. However, through a process of self-assessment and/or referral to the EA's Definition of Waste Service, the Appellant would be able to consider the process in depth and confirm what processing may be acceptable, and subject to what sampling, testing and/or quality assurance regime. There have been repeated indications that the Appellant has been preparing such a variation application (including in EMS V11, CD4.8, which states that the application is "[e]xpected 10-2024"). However, the Appellant has instead chosen to pursue this appeal.
9. Finally, the EA's witnesses at the inquiry are qualified professionals who have given credible and consistent evidence. In contrast the Appellant's witnesses pursued various and inconsistent positions in favour of the Appellant's interests. The Appellant has not been transparent or candid in the information provided in support of its appeal, but has consistently sought to argue that it is for the EA to demonstrate pollution, not for it to show testing (or even a testing regime) that explains how pollution risks are addressed. MM accepted that parts of his evidence did not reflect the Appellant's actual operations

(XX, by reference to para. 25³) and instead of demonstrating compliance with the WRAP Protocol sought to criticise that guidance as “vague”. Where there is conflict between the evidence, the EA’s evidence is to be preferred.

Issue (1): EPR Reg. 36(2)

10. The issue under Reg. 36(2)(b) and (c) can be taken shortly. As set out in opening (para. 13), the EN must be read as a whole. It is nonsensical to criticise certain parts of it only, especially where they are mutually reinforcing, as here. At the inquiry, the Appellant’s witnesses accepted that they understood what the EA is trying to achieve, but criticised it as difficult to comply with (which is a different issue) (MM roundtable). The Appellant could not point to anything that indicated a statutory shortcoming in the EN (NB roundtable).

11. Dealing with the residual arguments. The Appellant maintains a case that the EN ‘misfires’ – picking up language from Upjohn LJ in Miller-Mead (CD10.1). The primary basis for this appeared to be a contention that the EN should have alleged a contravention of EP condition 2.1.1, rather than condition 1.1.1(a). However, JS clearly explained the reason for the EA’s decision to enforce against non-compliance with condition 1.1.1(a), i.e. to take a positive approach, aimed at the Appellant’s written management system, to ensuring that the Site comes back into compliance. Identifying a ‘root cause’ in this way is consistent with normal practice (JS XX) and guidance (CD6.10, principle 4). It is accepted that requiring that the Appellant’s EMS sets out steps to prevent trommel fines from being processed through the wash plant is not fundamentally different from requiring the Appellant only to authorise the wash plant in accordance with the limits in Table S1.1 for activity A2. However, on any view, it cannot arguably be said that the EA in this case *needed* to enforce against the breach of condition 2.1.1. As far as ‘misfiring’, that language is used in Miller-Mead by reference to the East Riding County Council v. Park Estate (Bridlington) Ltd case where a planning notice has been brought under an inapplicable

³ The paragraph is intended to argue that the Appellant’s has controls on the material that goes to the wash plant, but wrongly suggest that the material goes to a picking line “prior to feeding the trommel”. That is obviously not a typographical error as suggested in XX.

provision of the then TCPA – in such a case, the enforcement notice in Upjohn LJ’s words, “*completely misfired*” (p. 23). That is not remotely the case here.

12. A point was taken at the inquiry about the EN referring to the Appellant’s “*Environmental Management System*” rather than “*written management system*” which is the term used in condition 1.1.1(a) and the EPR. As JS said, however, this complaint is ultimately of no consequence – the terms are interchangeable. Both an EMS and WMS may comprise more than one document, but they must be identifiable written documents. The Appellant has only ever submitted its successive EMSs as evidence of its WMS in the past (JS roundtable). The EA accepts that documents properly referred to in the EMS, such as the Dust Management Plan (not an issue here) may be taken as part of the EMS (or WMS).⁴ However, older documents, random plans or various test results and/or WTNs (CD7.2-7.4) are not. For the purposes of this inquiry, the EA proceeds on the basis as relevant that the Appellant’s EMS comprises CD4.1 (the Aggregates Production Protocol), CD7.1 (sampling plan) and the EMS itself. There is no need to amend the EN to replace EMS with WMS, but if the Inspector considers it appropriate, he may do so without prejudice, as was common ground.

13. The Appellant’s comments on the EA’s statement of case make a separate point regarding point 1)c) of Sch. 1 to the EN which is: “*[t]he effect of requiring end-of-waste processes, for instance, to be recorded in an EMS would be to bring non-compliance into the criminal sphere*” and that “*[r]endering non-compliance with a WRAP protocol a criminal offence should only be done after Parliament has considered whether this is an acceptable outcome*”. This is an overblown, and ultimately bad, point. First, guidance makes clear that it is appropriate for an operator’s written management system to prove compliance with end of waste criteria (CD6.9 p. 12). The EN does not require compliance with the WRAP Protocol, that is just one way of demonstrating end of waste. Second, end of waste is a fundamental concept with the WFD (CD9.7) – see esp. Art.6. It is part of UK law and does not need ratification by Parliament before it may be expected of operators as part of their permitted waste management activities. Third, there is nothing unreasonable about

⁴ They are also separately referred to the EP.

expecting producers of products from waste, such as the Appellant, to be able to demonstrate that they are no longer waste.

14. As far as the possibility of prosecution generally, it is correct that breach of an EN is an offence (EPR Reg.38(3)), but so is breach of the condition of an environmental permit (Reg.38(2)). In this case the EA chose to issue an enforcement notice – following that issuing of multiple CAR forms – to give the Appellant an opportunity to come into compliance, and set out how that might be done.
15. The EN could, of course, have been more prescriptive, but that would have come with its own potential problems – e.g. the Appellant may have complained that it was overly prescriptive and precluded alternative ways of addressing risks. The EN – in line with a modern approach to regulation – is not unduly prescriptive. The question under this issue is whether the EN is *sufficiently* prescriptive so that the Appellant knows what it must do. It is.

Issue (2): Interpretation of the EP

16. It is common ground that the interpretation of the EP is essentially a legal issue (see NB para. 28, MM XX). The EA's opening submissions address the issue at some length, and the Inspector is referred to those paragraphs (paras. 15-30). In short summary, the correct approach is:

- 1) The natural and ordinary meaning of the document itself is key, having regard to the document as a whole, and its purpose.
- 2) Other documents that are expressly incorporated may also be considered.
- 3) Beyond that, background documents are not admissible aids to construction unless there is a relevant ambiguity that needs resolving.
- 4) There is an important distinction between "*public documents*" such as the EP in this case and private contractual documents, in particular "[t]here is only limited scope for the use of extrinsic material in the interpretation of a public document,

such as a planning permission or a section 36 consent” (Trump International Golf Club (CD10.6) para. 33 per Lord Hodge.⁵

17. The approach to interpreting private contractual documents is not completely different,⁶ but it does not provide apposite or useful guidance to the Inspector given the relevant Supreme Court authority, in particular, of Trump.
18. In a nutshell, the EA’s case on interpretation here is that the natural and ordinary meaning of the EP – read as a whole – is that it authorises three separate activities and applies separate controls to each one. Those controls include controls on the material which it is appropriate to process or treat within each operation, by reference to EWC codes (and in some cases additional stipulations) set out in Tables S2.1, S2.2 and S2.3. As JS indicated (Ex and Insp Q) this is entirely normal drafting for environmental permits. It also accords with the purpose of the EPR – to set out controls on activities in the interests of environmental protection.
19. The contrary interpretation favoured by the Appellant is that the EP should be interpreted as imposing no further controls on the treatment of waste materials once they have been accepted into the Site. That should be firmly rejected. It does not accord with the natural meaning of the EP. It would render the limiting of the A2 wash plant in Table S1.1 to “wastes listed in Table S2.2” and the specification of EWC codes in Table S2.2 itself otiose. The Appellant’s interpretation would also be absurd. It would mean, as JS pointed out (Ex), that materials containing asbestos (codes 17 06 01 and 17 06 05 in Table S2.1) could be treated in the wash plant. It would also mean that any material imported into the A1 WTS could be treated in the composting facility (MM XX).

⁵ That approach is essentially the same as the approach taken by Lord Carnwath at para. 66, who observed that there are “good reasons for a relatively cautious approach” which “arise from the legal framework within which planning permissions are granted”, albeit they do not require “a completely different approach”. That approach was reiterated and followed in Lambeth LBC v SSHCLG [2019] UKSC 33; [2019] 1 WLR 4317 (CD10.9) paras. 15-19.

⁶ It is anticipated that GW may develop submissions by reference to wholly private contractual disputes such as Wood v Capita (CD10.7) and Sara & Hossein Asset Holdings (CD10.11).

20. At the inquiry, the Appellant pursued other arguments in a scattergun manner to try and support its interpretation: criticising other parts of the EP and arguing about EWC waste codes. These arguments do not help its position.
21. First, the Appellant drew attention to the relatively short description in the introductory text to the EP (JS XX). However, that description does not support any notion of the amalgamation of activities A1 and A2. The soil processing facility is separately identified. In any event, the introductory note is a non-statutory preamble to the EP that expressly *“does not form part of the permit”* and against which the EA would not regulate a site (JS Re-ex).
22. Second, the Appellant drew attention to a grammatical (or syntactical) error in condition s.2.3.1(a), but that is obviously both nugatory and irrelevant.
23. Third, the Appellant drew attention to what appears to be a mistake in condition 2.3.2(a) that relates to waste acceptance. As JS accepted (Re-ex), the condition should almost certainly state that waste shall only be accepted if *“it is of a type and quantity listed in schedule 2 table S2.1, S2.2 or S2.3”* – i.e. to allow materials to be accepted on site for the A2 soil processing facility (which is operation) and the A3 composing facility (if it were operational). That apparent mistake however has no bearing on the parts of the EP that are relevant here, which concerns treatment of waste accepted, not the acceptance of waste. It is an example of an obvious error in the EP,⁷ but it does not make the EP inoperable. Nor is it something about which the Appellant has complained (JS Re-ex). If it were to become an issue, as JS explained, it could be readily and discretely remedied. However, it does not arguably affect the natural and ordinary meaning of the parts of the EP that are in issue in this appeal.
24. Fourth, it was put to JS in XX that the correct approach is that material that is accepted onto site under a EWC chapter 17 code should not ‘change’ to a chapter 19 code simply because it is processed in the trommel – i.e. that the premise of the EA’s enforcement

⁷ That also appears in the draft version that was agreed by the Appellant (ID3).

action is wrong. Presumably, the intention behind the argument is to get around the omission of most types of code 19 12 12 (and any 19 12 11*) material from Table S2.1. The Appellant's own witness did not endorse the argument, which stems from counsel (MM XX and Re-ex). The argument is obviously bad. Trommel fines from mixed waste are properly classified under EWC code 19 12 12/11*. That is a well-established position (and JP's evidence in this regard was not challenged). It has also been the Appellant's own interpretation (see e.g. CD7.2 p. 10 and CD7.3 p. 1, MM XX). The alternative posted by GW is that the material falls under chapter 17 (or, presumably chapter 20). But that does not help the Appellant. Neither of the applicable codes for mixed waste in those chapters (17 19 04 or 20 03 01) may be treated in the wash plant applying Table S2.2. The reason is the same: the variable and potentially contaminated/hazardous nature of the waste stream. The argument is therefore both bad and self-defeating of the Appellant's own objective.

25. The Appellant maintains its argument that the EP should be interpreted in light of what is said to be the 'understanding' between the Appellant and the EA – or, specifically, Rachel Argyros – in advance of the permit application being made. However, the fact that an EA officer suggested to the Appellant that he would need to put together proposals for a permit variation application if he wished to continue operating as he was doing (see esp. CD8.1 and CD5.2), does not mean that the EP that was subsequently granted on the basis of the *status quo*. There are some references in some background documents to the transfer of inert materials from the waste transfer station/trommel to the wash plant, but that does not clearly indicate fines from a mixed waste stream, that would not be inert. As JS emphasised in XX, the terms in which the operations are described in those passages is ambiguous (see also JS paras. 54-58 and EA's opening submissions para.24).

26. Moreover, it is significant that the Appellant did not challenge the EP as issued, or the draft EP that was circulated following its application. With regard to the latter point, it is surprising that the Appellant did not see fit to supply this obviously relevant information to the EA or on appeal. Instead MM's evidence wrongly characterise the process as "*entirely in the EA's hands and the varied permit was issued as requested*" (para. 21). The actual position is that the EA emailed the Appellant's representative with a draft copy of

the EP on 24 June 2011 (ID4). That email explained that the permitting officer had split the remaining tonnage of 299,500 tpa⁸ between the WTS and the wash plant, ascribing 149,750 tpa each. It sought the Appellant's comments on that (and anything else), including the conditions and waste code limitations for each activity set out (which are the same as found in the final EP). The Appellant responded on 12 July 2024 (ID5) indicating as regards tonnage:

"Tonnage for the transfer station and soils washing plant- this is more difficult to predict as some of the waste that is accepted as part of the transfer station process will possibly be put through the soils washing plant. As long as the total annual tonnage doesn't exceed that permitted in the permit that should be acceptable. So maximum 299500 tonnes for the transfer station and the same for the soils washing plant but with a annual combined tonnage for the two operations shall not exceed 299500 tonnes" (underlining added).

27. The position that was being represented to the EA by the Appellant in 2011 in connection with the permit variation application was not that c.95% of the material treated in the wash plant derives from mixed waste via the WTS trommel, but that a strictly limited amount of WTS material may *possibly* be put through the wash plant. That is consistent with only a limited amount of suitable (and suitably coded) material processed in the WTS (as code 19 12 09 or otherwise) being processed through the wash plant. If there were ambiguity about the ordinary interpretation of the EP (which there is not), it would be admissible correspondence and it supports the EA's position, not the Appellant's. It is obviously pertinent and it counts against the Appellant's self-serving interpretation of the background.

⁸ Of the total maximum storage across the site of 300,000 tonnes, with 500 tonnes removed for the composting facility: see EMS V 7.1 (CD4.2) paras. 1.5.4-1.5.5.

Issue (3): the EMS

28. It is possible to take the final issue quite shortly in these closing submissions. The Appellant states that if the EA approved the washing of trommel fines for the production of aggregates in the EP, *“then there is no requirement for the Appellant to make any reference to the process in the management system”* (Comments CD1.3 para. 32f). However, even if the EA is wrong about the interpretation of the EP, the Appellant’s position that the EMS *“should not contain measures to prevent the washing of trommel fines”* fails to identify and/or minimise risks of pollution as required by EP Condition 1.1.1(a).
29. The Appellant’s EMS (or WMS) clearly does not identify and minimise the risk of pollution arising. This is for three reasons. First, it does not prevent an activity that is not authorised under the EP from taking place. Second, it contains no testing or other processes to assess or mitigate the environmental risks arising from the activity on the Site. Third, it does not ensure that procedures are in place to ensure that aggregates produced meet end of waste criteria and therefore avoid off site pollution. These points may be taken briefly in turn.
30. Regarding the scope of the EP, as already stated, this is a fundamental issue on either the EA’s or the Appellant’s cases. It falls to the Inspector to determine. The EMS cannot be used to extend the scope of the EP.
31. Regarding on site impacts, the EA’s concern has (understandably) been about drainage given that the wash plant area is open and the Appellant’s EMSs have consistently stated that the area drains to surface water or soakaway (EMS VV 7.1 and 7.2 (CD4.2 and CD4.5) para. 2.8.1 and VV 10 and 11 (CD4.7 and CD4.8) paras.2.1.10(d)). Despite this being raised by the EA in CAR forms and in its evidence to this inquiry, it was only at the site visit and in his oral evidence⁹ that the Appellant indicated that different arrangement exists using a closed system. If that is right, as JS explained (Ex) it gives rise to concerns about the

⁹ The 17 July 2025 drainage plan (CD4.9) does indicate that the drain outlet is capped, but provides no other information.

management of the wash water. There is nothing in the Appellant's EMSs or other documentation to explain that.

32. There is clear evidence, observed by EA officers and before the Inspector of the trommel fines in issue steaming and giving off unexplained leachate (see CD5.6 and CD5.4). MM indicated in re-examination that steaming from trommel fines on the Site happens "*all the time*". However, neither he nor the Appellant appear to have ever investigated or tested the steaming material.

33. Regarding off site impacts, as the Appellant confirmed, he has no control over where exported products are used (JB XX). Both the source and the nature of the product however give rise to obvious concerns. To take one example, fragments of cables are clearly visible in the aggregates as the Inspector will have seen on site, and the EA confirmed at prior site visits. Cables are a hazardous waste stream that may contain POPs, posing a risk of bioaccumulation and persistence in the environment (JS Ex and XX). Contamination however may well not be readily visible. Soils are likely to disguise contaminants.¹⁰ The EA does not have empirical evidence of pollution from the Site, but it has both evidence and a sound basis for concluding that there is a risk of pollution that needs to be addressed.

34. The Appellant's EMS (or WMS) does not contain any adequate processes to mitigate the risk of pollution (JS XX). Successive EMSs have only provided for the assessment of waste inputs and outputs. The input checks are extremely limited photographic checks (NB Ex) to ensure that the material coming into the WTS complies with the range of EWC waste codes in Table S2.1. However, given that an estimated 95% of that material is mixed waste falling within codes 17 09 04 or 20 03 01 such checks provide little reassurance in relation to the resulting trommel fines.

35. The output checks for the aggregates appear to be founded upon the WRAP Protocol, although there is no adequate plan, or clear evidence of what is done. The 2008

¹⁰ Such as asbestos fibre, oils and heavy metals (JS Ex).

Secondary Aggregates Production Protocol (CD4.1), which is (now) referred to in EMS V 11, has not been updated to have regard to the current (2013) WRAP Protocol and in any event appears to be predicated on the basis that acceptably inert waste materials be used for processing (see para. 26). From oral evidence, it appears to be the case that there is checking every 6-8 weeks (NB Insp Q) which is limited. As far as the Protocol (CD6.2), it provides clear guidance, aimed among other things at “*protecting human health and the environment (including soil)*” (para. 1.2.1(iv)). However, that depends upon it being complied with, including its requirements on the inert nature of input material (see esp. section 2.3).¹¹ The quality assurance/testing of final product referred to in the WRAP Protocol concerns its grading and suitability for practical use, rather than environmental risks (JS Ex, MM XX), which would not arise in the same way were the Protocol followed. The position is not helped by the other documents relied upon by the Appellant as part of its EMS.

36. The Appellant can point to other sampling, although there is extremely limited evidence of either the process or the results provided (CD7.2 and CD7.4, JS Ex). The 2022 sampling plan (CD7.1) is a confusing document that appears to relate only to codes 19 12 12 or 17 05 04 material when it is accepted on Site (despite the fact that 19 12 12 material is not included in Table S2.1). It is a “*rushed*” (MM XX) and inadequate document that appears to have been produced in response to the CAR form following the EA’s 16 December 2021 site visit (CD5.6). There will be other testing, which is required where material is sent to landfill – whether fines, filter cake or other material. However, that testing is done for a different purpose (and in a different context) (JP Insp Q) and is not of direct relevance to the environmental impacts caused by the other outputs of the wash plant. The Appellant indicated that there had been issues with filter cake testing on at least two occasions (NB Insp Q). To the extent that this testing is relevant, it should be noted that the EA has requested copies of past waste assessments carried out for filter cake (see CD5.7 p. 4, third bullet). This have never been provided. Insofar as filter cake

¹¹ The Appellant’s argument (in MM Re-ex) appeared to evolve to a position that the input materials are in fact the output materials. This improbable suggestion avoids there being any process controls. It cannot be the basis on which the Appellant would or should have got any WRAP-related funding.

testing is relied upon by the Appellant, there is no written evidence of when or how it is done, or how it relates to aggregate production.

37. It is hard to see the justification for the lack of sampling and testing – and of any processes relating to it for the Site. In re-examination MM referred to his experience of carrying out testing under parts of the WM3 guidance (CD6.5). However, for this Site, the Appellant's position is consistently to refer back to an 'understanding' with the EA from 2009 and 2010 which, the Appellant says did not require such sampling/testing (MM). That is quite inadequate. The EA has consistently raised concerns about testing and sampling in recent CAR forms (MM Insp Q). On the basis of its misconceived interpretation of the historic context, however, the Appellant has failed to engage with those concerns.

38. Overall, the Appellant's EMS is clearly inadequate to address either the scope of the permitted activities or the risks engendered by the operations carried out at the Site. The EN is valid and justified in alleging a breach of EP Condition 1.1.1(a) and requiring the steps specified.

Conclusion

39. For the above reasons, and those in the EA's opening submissions, statements of case and evidence, it is submitted that the appeal should be dismissed. The EN should be upheld and the Appellant required to engage with the issues raised.

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FTB Chambers

13 November 2025